NEITHER NEW NOR UNEXPECTED?: S 44(i) COMMONWEALTH CONSTITUTION INTERPRETIVE CHOICES, REPRESENTATIVE GOVERNMENT AND REHABILITATIVE AND RESTORATIVE REFORM

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I INTRODUCTION

The High Court's decisions regarding s 44(i)¹ of the *Constitution* in the *Citizenship Seven* case² and in *Re Gallagher*³ in finding disqualification of parliamentarians as ineligible to sit, present issues concerning the construction of representative government by the High Court, the Executive and the Parliament. These institutional responses to representative government, as mandated by sections 7 and 24 of the *Constitution*,⁴ have a significant impact upon representational participatory rights.

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Section 44(i) Commonwealth Constitution 'Any person who (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is the subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

² Re Canavan Re Ludlam Re Waters Re Roberts [No 2] Re Joyce Re Nash Re Xenophon (2017) 263 CLR 284.

³ Re Gallagher (2018) 263 CLR 460.

Section 7 'The Senate shall be composed of senators for each State, directly chosen by the people of the State...'; s 24 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth'.

The article's thesis is that the High Court's recent s 44(i) constitutional jurisprudence has revealed some interpretational deficiencies in articulating the scope of this aspect of representative government, namely the capacity for representation where foreign citizenship issues emerge. The High Court's interpretive choices were demonstrably at odds with resolving s44(i) matters in a manner consistent with a broader and inclusive conception of representative government. Interactions of the other institutions of government, the Executive and the Parliament, likewise reveal institutional failings with s 44(i) matters. Those subsequent decisions are also at odds with a broader and inclusive conception of representative government. The central legal problem is that the institutional approach of the Court has affected qualitatively the form and realisation of elected representative participation under the Constitution. This article, through analysing and commenting upon a series of interlocking issues, expounds how and why this situation has come about. Different interpretive choices were open to the Court, meaning that consequences flowing from such decisions were not inevitable. Such analysis provides context and will help frame Executive and Parliamentary remedial responses.

The article demonstrates that contentious issues arising from the recent s 44(i) cases are neither new nor unexpected. The little available information as to the purpose and historical formation of s 44(i) in the 1890's Convention Debates is canvassed. Relevant commentary also emerges in the form of Parliamentary Committee and Constitutional Commission reports. The context of each of the above allows the initial Executive response to potential disqualification of government members — through predictively asserting an interpretation based on minority judgments in *Sykes v Cleary*⁵ — to be properly assessed from its political dimension, and its contrary approach to the majority Court judgments.

Informed by this background, the s 44(i) cases of *Re Canavan* and *Re Gallagher* are analysed through the interpretive choices made by the Court, linked to consequences for the candidate participatory

⁵ (1992) 176 CLR 77.

aspect of representative government. Of critical interest is how the Court has subsequently developed, and departed from, s 44(i) principles partially articulated in *Sykes v Cleary*. These principles comprise the taking of all reasonable steps for renunciation prior to nomination as a candidate for election, linked to the constitutional imperative that a foreign law cannot irremediably prevent an Australian citizen from standing as a candidate in a federal election. Particularly revealing is the Court's sequential closing off, in the reasoning in *Re Canavan*, then conclusively in *Re Gallagher*, of more liberalised, accommodative interpretations for candidate participation as consistent with s 44(i). The Court settled upon a high exclusionary threshold requirement of being irremediably prevented from renunciation of foreign citizenship.⁶

This unnecessarily constraining s44(i) interpretation, is then supported by a brief comparative look at the Court's interpretation and implications around the implied freedom of political communication and participatory voter rights. These two items form a related, contemporaneous set of representative government implications. Two further factors are discussed as relevant to understanding the High Court's interpretive choices, including disconnection of those choices from enhancing electoral candidature, elemental to representative government. These are first, the Court's interpretive perspective judicially producing certainty and clarity, but ironically perpetuating uncertainty at a practical level. Second, the Kiefel court consensus approach has further contributed to this phenomenon.

These conclusions point towards the need for other representative governance institutions, the Executive and the Legislature, to engage in remedial reform. However, a critical question arises around the compromised legitimacy of these institutions regarding compliance in nomination of candidates and in institutional self-interest constraining s 44(i). Consideration is made of four important contemporary Australian studies regarding community confidence in and attitudes toward representative government institutions and practices. This need to carefully craft remedial responses is confirmed. The 2018 Joint

⁶ Hereafter referred to as 'irremediable'.

Standing Committee On Electoral Matters majority report is argued to inadequately address particular concerns. Adopting all its recommendations would reinforce a narrow conception of representative government, endorsing the inadequate nomination compliance practices of some politicians.

In concluding that it is important to get such s 44(i) reforms right, remedial measures, whether legislative or constitutional, need to be modest, practical and grounded in greater citizen participation and political accountability to successfully respond to the challenges identified. Accordingly, the Executive and the Parliament have an opportunity to restore, rehabilitate and renew confidence and accountability in the system of representative government.

II INFORMING BACKGROUND MATTERS

A The s 44(i) Drafting History: A Precis

The drafting history of s 44(i) is at best minimal and opaque. The first official draft of the Constitution bill drafted for the 1891 Australasian Convention, in ascribing disqualification only to acts of allegiance and citizenship which occurred after election (and not nomination) was 'derived from the *British North America Act* 1840 (Imp) as replicated in the *New Zealand Constitution Act* 1852 (Imp) and the *British North America Act* 1867 (Imp)'. This schema was similar to the Australian colonies' constitutions, which were later to become the six states of the Commonwealth of Australia. The first official draft was subsequently modified at the 1891 Australasian Convention to depart from the *British North America Act* precedent, by removing the restriction of application only to post election acts of allegiance and citizenship. This modification persisted 'in substantially identical

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See John Quick and Robert Garran The Annotated Constitution of the Australian Commonwealth 1901 (reprint Legal Books, 1995) 490-491.

⁸ Re Canavan (2017) 263 CLR 284, 301 [28].

^{9 (2017) 263} CLR 284, 302 [30].

form' in the 1897 Adelaide Convention and in the 1897 Sydney Convention. ¹⁰ A further re-casting of the provision was approved at the Melbourne Convention in March 1898, ¹¹ occurring as 'part of a large number of amendments prepared by the Convention's drafting committee in the period between the Sydney session and the Melbourne session'. ¹²

In Re Canavan, the High Court observed firstly the uncontroversial adoption of s 44(i), including no articulated differences in the reasons for the 1891 text and the 1898 text, with both texts extending beyond 'the Imperial and colonial precedents' which had confined disqualification to post election acts of allegiance and citizenship.¹³ Secondly, the Court observed that the drafting history of s 44 'cannot be treated as indicative of an intention on the part of the framers to cleave particularly closely to those precedents', 14 identified as applicable to existing parliamentarians. If anything, the drafting history of s 44 suggests that confining disqualification to foreign allegiance and citizenship once elected office is attained, in conformity with precedent, would have significantly reduced numbers of s 44(i) disqualification by foreign citizenship. Further, an appreciation of that drafting history might have tempered the more ambitious constitutional interpretive claims disputing s 44(i) disqualification relating to nomination.

A proposal at the Sydney session in 1897 to insert at the beginning of the clause 'until the Parliament otherwise provides' was then defeated by 26 votes to 8: Quick and Garran (n 7) 491.

The re-draft of the clause that was to become s 44(i) was agreed to without discussion — (2017) 263 CLR 284, 303 footnote 47. Gerard Carney, 'Disqualification of Members of the Australian Parliament — Recent Developments and the Case for Reform' (2018) 24 James Cook University Law Review 89, 95.

Re Canavan, (2017) 263 CLR 284, 303. The redrafted clause s 44(i) was considered in the committee of the whole at the Melbourne session, and agreed to without discussion: (2017) 263 CLR 284, 303, paragraph 34.

¹³ (2017) 263 CLR 284, 302, paragraph 29.

¹⁴ (2017) 263 CLR 284, 304, paragraph 35.

B The Three Parliamentary Committee and Constitutional Commission Reports: Reviews of Section 44(i)

Several Parliamentary Committee and Constitutional Commission reports demonstrate that contentious issues arising from the recent s 44(i) cases are neither new nor unexpected. A range of s 44 *Constitution* problems had long been identified by two Parliamentary committees and the Constitutional Commission, in three major reports — the Senate Standing Committee on Constitutional and Legal Affairs 1981 Report *The Constitutional Qualifications of Members of Parliament;* the 1988 *Final Report of the Constitutional Commission;* and the House of Representatives Standing Committee on Legal and Constitutional Affairs 1997 Report *Aspects of Section 44 of the Australian Constitution — Subsections 44(i) and (iv).* 17

Problematic issues concerning s 44(i) were repeatedly recognised, with each report making s 44(i) reform recommendations. ¹⁸ This extensive consideration of s 44(i) issues is an open, ¹⁹ but largely forgotten, secret of Australian politics. Most significantly, none of the earlier reports were acted upon by the Executive and the Parliament, in modest reform bills preparatory to a s 128 referendum. Recent, emergent problems with s 44(i) and other s 44 subsections had been repeatedly canvassed, and were predictable, latent and potentially serious. Inaction by governments of both major political parties, when

Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, The Constitutional Qualifications of Members Of Parliament Report by the Senate Standing Committee on Constitutional and Legal Affairs (AGPS,1981).

Constitutional Commission, Commonwealth of Australia, Final Report Of The Constitutional Commission 1988 Volume Two – Qualifications and disqualifications of members of Federal Parliament, 274-306, paragraphs 4.735 to 4.898 (1988).

¹⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv) (1997).

See Senate Standing Committee Report (n 15) 14 [2.26]; Constitution Commission Report, ibid 283, [4.768-4.771]; House of Representatives Standing Committee Report, Ibid xi –xii Chapter 2 - Subsection 44(i).

The phrase 'open secret' was used elsewhere: Joe McIntyre, 'The dual citizenship saga shows our Constitution must be changed, and now' The Conversation 17 November 2017.

so informed, was mirrored (as substantiated in the number of s 44(i) referrals to the Court) by numbers of politicians not taking adequately prudential steps regarding foreign nationality upon nomination.

Recent constitutional litigants and public commentary may have been better informed of s 44(i) risks by referring to the experiential, predictive content of these reports. The lack of reference to the reports in political responses to the recent emergent s 44(i) issues shows continuity of earlier Parliamentary and Executive inaction. Perhaps this was through bipartisan political restraint previously exercised in less fractious political times.

1 *The 1981 Review*

The Senate Standing Committee on Constitutional and Legal Affairs in 1981 placed a premium on democratic participatory rights of Australian citizens 'in the highest levels of political life in the Australian democratic system,'²⁰ particularly where citizenship status was ascribed by a foreign legal system and such system does not permit voluntary relinquishment of that status.²¹

The Committee took the view that s 44(i) should be deleted.²² It qualified this by saying that the safeguards for institutional parliamentary integrity in s 44(i) against foreign influence and interference would not be adequately addressed by merely leaving the judgment on foreign allegiance or citizenship to the electors at a subsequent election.²³ Its solution was to retain some formal safeguards, derived from the original s 44(i) coverage, but embodied in a procedural provision.²⁴ A requirement of declarations should be statutorily included in the *Commonwealth Electoral Act 1918* (Cth).²⁵

²⁰ Senate Standing Committee Report (n 15) 11 [2:18].

²¹ Ibid 10 [2:16].

²² Ibid 11, noting the submission of Professor Sawer.

²³ Ibid [2:19].

²⁴ Ibid 12 [2:20].

²⁵ Ibid: First, requiring any person who is seeking nomination to the Commonwealth Parliament to declare at the time of his nomination whether, to

Redress for breach of this declaration was recommended as political, rather than constitutional: electors' assessment at the next election, rather than disqualification for a breached declaration.

2 The 1988 Review

The Constitutional Commission in 1988 recommended that s 44(i) be deleted and not replaced.²⁶ The *Constitution* should be altered, making Australian citizenship a necessary qualification for Parliamentary membership.²⁷

Whilst recognising that the disqualification 'is intended to ensure that members of Parliament do not have a dual allegiance, and are not subject to any improper influence from foreign governments,'28 concern arose where renunciation of foreign citizenship was either impossible or difficult.²⁹ In such circumstances, the person's 'right to take the fullest part in our representative democracy could be impaired by being ascribed a status by a foreign system of law that does not permit voluntary relinquishment of that status'.³⁰ The Commission and its Advisory Committee articulated a criterion of renunciation³¹ almost

his knowledge, he holds a non-Australian nationality and if he does, requiring him to make further declaration as to this other nationality...'. Then, a statement (a) that he has taken every step reasonably open to him to divest himself of the non-Australian nationality and (b) that for the duration of any service in the Commonwealth Parliament, he will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by his possession of the unsought nationality.

²⁶ Constitutional Commission Report (n 16) 283 [4.770].

²⁷ Ibid [4.768]; The reference in section s 34(ii) of the *Constitution* to 'subject of the Queen' would also be removed, even though the Parliament had already 'otherwise provided' under s 34 in the form of the *Commonwealth Electoral Act 1918* (Cth): Ibid 284 [4.773] 'To be a member of Parliament, a person must be (a) an Australian citizen and (b) an elector entitled to vote at the elections of members, or a person qualified to be such an elector'.

²⁸ Ibid 288.

²⁹ Ibid.

Jibid 288-289. The Commission recommended that 'Any Australian citizen, including a person with dual citizenship, should be able to stand for Parliament. Accordingly section 44 (i) should be deleted': Ibid 289.

³¹ Ibid 288 'Even though a person who is granted Australian citizenship may have taken all appropriate steps to relinquish the non-Australian nationality so far as

identical to that later adopted by the High Court in *Sykes v Cleary* and developed subsequently in s 44(i) cases.

3 The 1997 Review

The House of Representatives Standing Committee on Legal and Constitutional Affairs conducted its inquiry and reported in 1997, after the *Sykes v Cleary* and *Free v Kelly* s 44(i) cases.³² It was prescient about desirable certainty in elections³³ and stability of the political system, given the slender Government majority after the 2016 election and multiple referrals in 2017:

The Committee considers that the potential exists for challenges to the eligibility of a significant number of parliamentarians especially in view of the fact that a large number of Australian citizens possess dual citizenship. This represents a risk to the integrity and stability of the parliamentary system and to the government of the nation...it is not difficult to envisage a situation...where the balance between the major political parties, or coalitions of parties, in the House of Representatives was fairly even and where challenges to five or six elected representatives could throw into doubt the outcome of the whole election...In those circumstances, it could take months for High Court challenges to be resolved and for by-elections to occur.³⁴

It made recommendations partly similar to the two preceding inquiries.³⁵ Accordingly, two Parliamentary Committees and the

he or she is able, that person may have retained the status of a subject or citizen because of the laws operating in that country'. Prior to this, the Rights Committee (Advisory Committee) to the Constitutional Commission had recommended 'that a person should not be disqualified from becoming a member of Parliament because off unsought dual nationality', recommending that s 44(i) be repealed and leaving open to the legislature to enact a requirement that 'a prospective candidate to declare that he or she has taken *every reasonable step to divest themselves of non-Australian nationality'* (emphasis added): Ibid 287. This appears to be the genesis of the all reasonable steps test for renunciation in *Sykes v Cleary*, as continued in the *Citizenship Seven case*, as modified in *Re Gallagher*.

³² House of Representatives Standing Committee Report (n 17) 3 [1.7].

³³ Ibid 39 [2.76].

³⁴ Ibid 37 [2.72].

³⁵ It recommended that a referendum be held to (a) delete s 44(i) in its entirety (b) to insert a new provision requiring candidates and members of Parliament to be

Constitutional Commission had identified several potential s 44(i) problems over an earlier, extended period.

In the intervening twenty years, no government held any referendum to address concerns raised in the three reports, or indeed, any constitutional issues emerging from the Court's decided cases.³⁶ Moreover, the Australian Democrats 'on four separate occasions proposed bills to address the perceived limitations of section 44', but none were fully debated.³⁷ Australian Greens Senator Brown introduced a further bill in 1998 (and re-introduced it in 2003) with the intention of reforming sections 44 (i) and 44 (iv).³⁸ The further 2018 Joint Standing Committee Review of s 44³⁹ will be considered later,⁴⁰ as it is particularly relevant to contemporary reform.

Australian citizens and (c) to empower parliament to enact legislation determining the grounds for disqualification of members of parliament in relation to foreign allegiance: Ibid 39-41 and 42.

³⁶ Such as Nile v Wood (1988) 167 CLR 133, Re Wood (1988) 167 CLR 145, Sykes v Cleary (1992) 176 CLR 7, Free v Kelly (1996) 185 CLR 296 and Sue v Hill (1999) 199 CLR 462.

³⁷ Ian Holland, Commonwealth Parliament, Parliamentary Library, 'Section 44 of the Constitution' E-Brief (March 2004), 6. The Bills listed were the Constitutional Alteration (Qualifications and Disqualifications of Members of Parliament) Bill 1985 (Cth); the Constitutional Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1989 (Cth); the Constitutional Alteration (Qualifications and Disqualifications of Members of Parliament) Bill 1992 (Cth); and the Constitutional Alteration (Electors Initiative, Fixed Term Parliaments and Qualifications of Members) Bill 2000 (Cth).

Section 44 of the Constitution', (n 37) 8. The Constitutional Alteration (Right to Stand for Parliament Qualification of Members and Candidates) Bill 1998 (Cth) was listed on the Senate notice paper again and debated again on 15 May 2003 in the Senate, but failed to achieve the absolute majority in support required under the s 128 referendum procedure: Ibid 6.

³⁹ Joint Standing Committee on Electoral Matters, Parliament of Australia, Excluded The impact of section 44 on Australian democracy (May 2018).

⁴⁰ Under the headings 'Responding to the s 44(i) cases by contemporary review: The 2018 Joint Standing Committee review (a) The majority Joint Standing Committee report: a critical appraisal and (b) The minority Joint Standing Committee report: remediation through responsibility'.

C Decisional Principles Framed by a System of Commonwealth Constitution Representative Government

The constitutional system of representative government, reflected in the spare language of sections 7 and 24, necessarily informs the decisions such as *Sykes v Cleary*, *Re Canavan* and *Re Gallagher*. Two examples of the nature of constitutional representative government are illuminating:

Three great principles, representative democracy (by which I mean that the legislators are chosen by the people) direct popular election and the national character of the lower House, may each be discerned in the opening words of s 24 ... The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However, the particular quality and character of the content of each one of these three ingredients of representative democracy ... is not fixed and precise.⁴¹

Gummow J in *McGinty v Western Australia*,⁴² had observed that the *Constitution* prescribes only four elements of representative government.⁴³ The first of these was 'the requirement of s 24 that members of the House of Representatives be directly chosen by the people of the Commonwealth (and of s 7 that senators be directly chosen by the people of the relevant State).⁴⁴ It then followed,

that 'the phrase in s 24 'directly chosen by the people of the Commonwealth' is a broad expression to identify the requirement of a popular vote'. It also follows ... that the phrase used in s 24 (and I would add the like phrase used in s 7) is not to be dissected in a way that would

⁴¹ Stephen J in Attorney General (Cth) Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 56.

⁴² (1996) 186 CLR 140.

⁴³ Hayne J in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 69-70 cited Gummow J in *McGinty v Western Australia* (1998) 186 CLR 140, 275-276.

^{44 (2010) 243} CLR 1, 69. The three other elements were s 24 tying the number of members of the House of Representatives to the number of senators; s 24 relating the number of House of Representative seats in states to the 'respective numbers of their people'; and s 24 providing for a minimum number of five House of Representatives electorates for the original states: (2010) 243 CLR 1, 70.

give the words 'chosen by the people' an operation distinct from s 24 (or s 7) as a whole'. 45

This minimally identified character of representative government⁴⁶ in sections 7 and 24 was reflected in a narrowing of the scope for making constitutional implications, and in the narrow interpretive methodology the Court settled upon in the new s 44(i) cases.

Combined with the institutional responses of the Executive and the Parliament to s 44(i) matters, it creates some reform challenges if public confidence in the system of representative government is to be improved.

D The Executive's Initial 2017 Response to Potential s 44(i) Disqualification of Government Members

The historical drafting of s 44 and the recommendations of the three reviews relating to s 44(i) provide an informative background for assessing the initial Executive response to potential disqualification of government members. That response predictively asserted an interpretation founded on the *Sykes v Cleary* minority judgments.⁴⁷ The substantive content of the background of this drafting and of the three reviews serve only to emphasise the overtly political statements of this Executive response. It is uninformed by the section's drafting and the earlier reviews.

⁴⁵ (2010) 243 CLR 1, 70.

Varied conceptions of representative government, as distinct from its minimal standard implied in the *Commonwealth Constitution*, have been observed: see Murray Gleeson, 'The Shape of Representative Democracy,' (2001) 27 *Monash University Law Review* 1, 3; James Stellios, *Zines's The High Court and The Constitution* 6th Edition (Federation Press, 2015), 562, 608-609; Geoffrey Lindell, 'Expansion or Contraction – Some Reflections about the Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 134; Samuel Murray, 'The Public Interest, Representative Government and The 'Legitimate Ends' of Restricting Political Speech' (2017) 43 *Monash University Law Review* 1, 6-7 (regarding compatibility with the legitimate ends concerning representative government).

The initial approach of the Executive — through the Prime Minister and the Attorney General — was to insist that the Court should, and was likely to, make an accommodative interpretation of s 44(i), ensuring parliamentary eligibility for the then Deputy Prime Minister, a New Zealand citizen. This strong Executive assertion was founded upon an earlier liberalised interpretation of s 44(i) in the dissenting judgment of Deane J in *Sykes v Cleary* (and residually upon the findings of Gaudron J). The then Attorney General stated:

We are confident that, on the proper interpretation of Section 44, Mr Joyce because of his unawareness of his status as a New Zealand citizen...would not be disqualified ... In two cases: *Nile v Wood* and *Sykes v Cleary*, in which a number of members of the High Court made it very clear that section 44 can't be read in broad terms because, if it were to be read in broad terms, then it could operate in a completely irrational way ... So in the cases in which I have referred several of the High Court judges have said that section 44 must be given a narrower or more confined interpretation than its literal words.⁴⁸

The then Prime Minister, Mr Turnbull stated:

The High Court has made it very clear that the operation of section 44(i) is not without limits and that it must be read in light of its purpose and intent, which is to prevent conflicts of loyalty arising among people who are members and senators ... Based on the advice we have from the Solicitor-General, the government are very confident that the court will not find that the member for New England is disqualified from being a member of this House — very confident, indeed ... The Leader of the National Party, the Deputy Prime Minister, is qualified to sit in this House, and the High Court will so hold.⁴⁹

This interpretive methodology was at odds with conventional judicial interpretive methodology and was frankly activist in sentiment. The ambitious, optimistic or perhaps unrealistic advocacy

⁴⁸ George Brandis, Attorney General *Lateline* (Interview, ABC Television, 14 August 2017).

⁴⁹ Commonwealth, *Parliamentary Debates* House of Representatives, 14 August 2017, 8264, 8265 (Malcolm Turnbull).

of the dissenting judgment of Deane J⁵⁰ from *Sykes v Cleary* is best comprehended as reconciling defence of a slender parliamentary majority with an aspirational, expansive interpretation of s 44(i).

More starkly, the above advocacy radically departed from earlier conservative criticism of judicial activism in constitutional and related cases. Further, these Executive assertions demonstrated a lack of understanding by the Cabinet and party organisations of the integrated conception of representative government developed by the Court. Appraisal of this necessarily involves a consideration of two issues — that of the system of representative government under the *Constitution*, and the determination of principles in *Sykes v Cleary* as to the taking of reasonable steps to renounce foreign citizenship. These background factors necessarily inform critique and analysis of the Court's later interpretive choices in the s 44(i) cases.

E The Foundational Principles and Guidance of Sykes v Cleary

Critical to understanding the resolution of s 44(i) matters in *Re Canavan* and *Re Gallagher* are the principles determined in the earlier case of *Sykes v Cleary*.⁵²

Selection of the Deane J judgment as the fulcrum of the Attorney-General's submission evidences this activism — Deane J was considered to be judicially activist on the Mason High Court: see Heather Roberts, 'A Mirror To The Man Reflecting On Justice William Deane: A Private Man in Public Office,' (2011) 32 Adelaide Law Review 17, 29-31, 35-37, 39-40, 43-44.

Examples are found in development of the implied freedom of political communication, as well as the non-constitutional topic of native title, especially in the Mabo and Wik decisions: see Dyson Heydon, 'Judicial Activism and the Death Of The Rule Of Law' (2003) 47 *Quadrant* 9, 16-17, 19, 21-22; Ian Callinan, 'An over-Mighty Court' (1995-1996) 51 *Refresher* 34, 40, 41; Ben Heraghty, ''Defender of the Faith? The Role of the Attorney-General in Defending the High Court' (2002) 28 *Monash University Law Review* 206, 225 citing the criticisms of the High Court by Coalition Deputy Prime Minister Fischer, 'several other Conservative State and Federal Members of Parliament', as well as Queensland Premier, Ron Borbidge.

⁵² (1992) 176 CLR 77.

In *Sykes v Cleary* a moderately accommodative approach to the taking of reasonable steps to renounce foreign citizenship was evident in the joint judgment of Mason CJ, Toohey and McHugh JJ, as well as the separate judgments of Brennan J and Dawson J. This was firstly reflected in a more purposive and contextual policy approach to the claims of representative government, integrated with a more flexible, adaptive approach to foreign law's role in the determination of nationality. The joint judgment of Mason CJ, Toohey and McHugh JJ observed:

There is no reason why s 44(i) should be read as if it were intended to give unqualified effect to that rule of international law... It would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance.

What amounts to the taking of reasonable steps to renounce foreign nationality must depend on the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connexion between the individual and the foreign State of which he or she is alleged to be a subject or citizen.⁵³

This suggested a multi-faceted approach in assessing the impact of foreign citizenship on issues of influence over parliamentarians, with the measures taken to renounce such allegiance informing such influence. Considering each of these issues necessarily involves a high level of judicial engagement and a deliberate weighting of each of the factors according to the circumstances of the particular case. These factors anticipate the Court's role as critical to ensuring candidate participation.

A pragmatic, purpose oriented, appraisal is similarly evident in Brennan J's judgment. That judgment observes first that the general rule that 'whether an individual is a national of a foreign power is ordinarily determined by reference to the municipal law of the foreign power,' is subject to qualifications; it notes also that recognition of

⁵³ (1992) 176 CLR 77, 107.

foreign law should *only be required* when that recognition fulfils the purpose of s 44(i).⁵⁴ The s 44(i) purpose was assessed as follows:

Section 44 (i) is concerned to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives; it is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power. It accords both with public policy and with the proper construction of s 44(i) to deny recognition of foreign law in these situations. If foreign law were recognised in these situations, some Australian citizens would be needlessly deprived of the capacity to seek election to the Parliament and other Australians would be needlessly deprived of the right to choose the disqualified citizens to represent them. However, there are few situations in which a foreign law, conferring foreign nationality or the rights or privileges of a foreign national, is incapable of enforcing a duty, of allegiance or obedience to a foreign power....So long as that duty remains under the foreign law, its enforcement ... is a threatened impediment to the giving of unqualified allegiance to Australia. It is only after all reasonable steps have been taken under the relevant foreign law to renounce the status, rights and privileges carrying the duty of allegiance or obedience and to obtain a release from that duty that it is possible to say that the purpose of s 44(i) would not be fulfilled by recognition of the foreign law.55

Dawson J also agreed with Mason CJ, Toohey and McHugh JJ and with Brennan J that s 44(i) 'should not be given a construction that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament'. A purpose and policy oriented approach to s 44 (i) application was likewise reflected in the reasonableness of circumstances of the case⁵⁷ and other considerations.

⁵⁴ (1992) 176 CLR 77, 113 per Brennan J.

⁵⁵ Ibid 113-114.

⁵⁶ (1992) 176 CLR 77, 131.

⁵⁷ Ibid per Dawson J.

Ibid including 'requirements of the foreign law for the renunciation of the foreign nationality, the person's knowledge of his foreign nationality and the circumstances in which foreign nationality was accorded to that person'.

The limits of the Court's flexibility were however reflected in not permitting the option of a candidate resigning from an office of profit after nomination but before declaration of the poll, or failing to resign and then be disqualified.⁵⁹

In contrast, even more flexible and accommodating interpretations of s 44(i) were provided by the minority justices. Deane J distinguished between Australian born citizens and naturalised Australian citizens 'where the relationship with the foreign power existed *before* the acquisition (or re-acquisition) of Australian citizenship'.⁶⁰ In stating that a qualifying element must be read into the second limb of s 44(i),⁶¹ that element extends to both 'the acquisition of the disqualifying relationship by a person who is already an Australian citizen,'⁶² but also to the 'retention of that relationship by a person who has subsequently become an Australian citizen'.⁶³ Deane J asserted the importance of a mental element as determinative of circumstances of 'the acquisition or retention of foreign citizenship'.⁶⁴

In relation to s 44(iv): (1992) 176 CLR 77, 100 per Mason CJ, Toohey and McHugh JJ: This was considered an unnecessary complication in electoral choice, contrary to certainty and speed in ascertaining the result as it was dependent on a candidate's action after polling day: see also Brennan J (1992) 176 CLR 77, 108 and Dawson J (1992) 176 CLR 77, 130.

^{60 (1992) 176} CLR 77, 127-128 (emphasis added). The distinction raised between Australian born citizens and naturalised citizens became crucial in articulating the Attorney-General's submission in the *Citizenship Seven* case.

⁶¹ Ibid

⁶² 'The effect of that construction of the sub-section is that an *Australia-born citizen* is not disqualified by reason of the second limb of s 44(i) unless he or she has established, asserted, accepted or acquiesced in the relevant relationship with the foreign power': (1992) 176 CLR 77, 127.

^{63 &#}x27;person who becomes an Australian citizen will not be within the second limb of s 44(i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section': (1992) 176 CLR 77, 128.

⁶⁴ See (2017) 263 CLR 284, 297-298 and Sykes v Cleary (1992) 176 CLR 77, 127 Deane J: 'The second limb (ie 'is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power') should...be construed as impliedly containing a similar mental element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned.'

Gaudron J similarly considered the international law principle determinative of citizenship as a flexible issue in the context of s 44(i), raising the choice of a municipal court not to apply the law of another country. This involved taking a different approach from the other justices. Gaudron J commenced with the proposition that municipal courts could decide on public policy grounds to refuse to apply the principle that, for the purposes of domestic law, foreign citizenship was to be answered according to the laws of the foreign country. Acknowledging that s 44(i) may impose limits on legislative power regarding foreign citizenship, such limits did not extend to a constitutional prohibition on the exercise of Commonwealth legislative power which responded to an application of foreign law as decisive of citizenship questions in Australia.

III DISQUALIFICATION SO HELD⁷⁰: INTERPRETIVE CHOICES AND THE CANDIDATE PARTICIPATORY ASPECT OF REPRESENTATIVE GOVERNMENT

It is critical how the Court subsequently applied and developed s 44(i) principles *partly* established in the earlier case of *Sykes v Cleary*. These principles comprise the taking of all reasonable steps for renunciation prior to nomination as a candidate for election, linked to

^{65 (1992) 176} CLR 77, 135 -136 per Gaudron J.

^{66 (1992) 176} CLR 77, 137 per Gaudron J: '... the solution is not to be found in reading down s 44(i): rather it lies in examination of the circumstances in which foreign law should be applied to determine questions arising under the subsection...whatever limits on legislative power are imported by s 44(i), it does not...limit the power of Parliament to provide...if prior foreign citizenship has been renounced in compliance with Australian law, the law of the country concerned should not be applied for any purpose connected with Australian law, including the determination of any question arising under s 44(i) itself.'

^{67 (1992) 176} CLR 77, 135-136.

⁶⁸ (1992) 176 CLR 77, 136.

⁶⁹ (1992) 176 CLR 77, 136-137.

An adaptation of the then Prime Minister's prediction as to the High Court's decision in the *Citizenship Seven* case: Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2017, 8263 (Malcolm Turnbull).

the constitutional imperative that a foreign law cannot irremediably prevent an Australian citizen from standing as a candidate in a federal election, as part of participation in representative government.

Particularly revealing is how the Court sequentially closed off, in the reasoning in *Re Canavan*, then conclusively in *Re Gallagher*, more accommodative interpretations, and the Court's construction of candidate participation as consistent with s 44(i). Its imposition of a high irremediable threshold, whilst eschewing an interpretive role commensurate with the importance of candidate participation in representative government, reflects the departure from the broader tolerances in *Sykes v Cleary*. Our attention now turns to analysing these matters and the Court's interpretive choices.

A The Citizenship Seven Case: Re Canavan

The 2017 iteration of s 44(i) disqualification issues commenced with the media conference announcement of resignation by the Western Australian Greens Senator Scott Ludlam, who held New Zealand citizenship. Senator Ludlam was apologetic, took personal responsibility and expressed a desire to avoid protracted legal uncertainty or a lengthy legal dispute, given the clarity of the section and the nomination procedures. Senator Ludlam's resignation, based on his own understanding of the section, was in marked contrast to the subsequent Executive statements of the Attorney General and of the Prime Minister, confidently (but ultimately erroneously) expecting a more indulgent High Court s 44(i) interpretation.

See 'Scott Ludlam Resigns From The Senate: Victim of Section 44 Dual Citizenship Role' (Media Conference Perth) AustralianPolitics.Com July 14 2017; 'Statement from Senator Scott Ludlam' AustralianPolitics Com July 14 2017; 'Greens senator Scott Ludlam resigns from Parliament after discovering he was ineligible to stand' Sydney Morning Herald (Sydney) 14 July 2017.

The Ludlam resignation preceded and prompted referral of questions to the Court pursuant to section 376 of the *Commonwealth Electoral Act 1918* (Cth) by the Senate for a number of Senators: Senators Canavan, ⁷² Waters, ⁷³ Roberts ⁷⁴, Nash ⁷⁵ and Xenophon, ⁷⁶ (as well as Senator Ludlam) and by the House of Representatives for the Hon Barnaby Joyce, ⁷⁷ in relation to these parliamentarians' capacity to be chosen, under s 44(i), as a senator or a member of the House of Representatives. This was due to various individual circumstances whether the parliamentarian was the subject or a citizen of a foreign power or entitled to the rights or privileges of a subject or a citizen of a foreign power. Subsequent to the Court's decision, ⁷⁸ other matters relating to s 44(i) were also referred to the Court of Disputed Returns. This was in the instances of Senators Lambie, ⁷⁹ Parry, ⁸⁰ Kakosschke-Moore ⁸¹ and Gallagher ⁸² and by the House of Representatives in relation to Mr David Feeney. ⁸³

⁷² High Court of Australia Case C 11/2017.

⁷³ High Court of Australia Case C 13/2017.

⁷⁴ High Court of Australia Case C 14/2017.

⁷⁵ High Court of Australia Case C17/2017.

⁷⁶ High Court of Australia Case C18/2017.

High Court of Australia Case C15/2017.

High Court of Australia Case C15/2017.

⁷⁸ Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash, Re Xenophon (2017) 263 CLR 284.

^{79 17} November 2017: In the matter of questions referred to the Court of Disputed Returns pursuant to section 376 of the Commonwealth Electoral Act 1918 (Cth) concerning Ms Jacqui Lambie. On 9 February 2018, the High Court ruled that Devonport Mayor Steve Martin, second on the Jacqui Lambie Network Senate ticket in 2016, was elected as Senator for Tasmania: [2018] HCA Transcript 11. Mr Martin had been expelled from the Jacqui Lambie Network on 7 February 2018, hours before the High Court ruled on his eligibility. On 6 February 2018, the High Court resolved the s. 44 (iv) issue of whether Mr Martin, the mayor of Devonport, was incapable of being chosen or of sitting as a senator by reason of holding an office of profit under the Crown, in Mr Martin's favour: Case C27/2017: Hearing 6 February 2018, Reasons for judgment 14 March 2018: Re Lambie (2018) 263 CLR 601.

⁸⁰ 17 November 2017.

^{81 29} November 2017: In the matter of questions referred to the Court of Disputed Returns pursuant to section 376 of the Commonwealth Electoral Act 1918 (Cth) concerning Ms Skye Kalaschke-Moore. The High Court ordered a special count of the votes cast at the election of 2 July 2016, resulting in Timothy Storer being elected to the vacant South Australian Senate seat. Mr Storer resigned his membership of the NXT party, which Ms Kaloschke- Moore represented: Re

By 5 December 2017 all MPs provided a statement of declaration on their citizenship to the Register of Members' Interests.⁸⁴ The document was then made public, indicating that several members and senators were unable to demonstrate that they had renounced their foreign citizenship prior to nominating as a candidate for the 2016 election ⁸⁵

1 Five Parliamentarians in Breach of s 44(i)

The Court found that five of the parliamentarians were in breach of s 44(i) in holding foreign citizenship or being entitled to the rights or privileges of a subject or citizen of a foreign power. 86 Senator Canavan and Senator Xenophon were found not to be in breach of s 44(i), 87

Kaloschke-Moore (2) [2018] HCA Trans 015, 15; [2018] HCA Trans 016, 5: Case C30/2017: Hearing 13 February 2018, Reasons for judgment 21 March 2018: *Re Kakosschke-Moore* (2018) 263 CLR 640.

⁸² High Court of Australia Case C32/2017. See the decision in *Re Gallagher* (2018) 263 CLR 460.

High Court of Australia Case C31/2017 8 December 2017. Mr Feeney resigned from the Batman electorate on 2 February 2018, causing a by-election to be held. See also *Re Feeney; Re Gallagher* [2018] HCA Trans 1 (19 January 2018) 5-6 (the two matters were heard simultaneously before Kiefel CJ).

⁸⁴ See Malcolm Turnbull, 'Press Conference: Citizenship and Section 44 – Parliament House' Prime Minister Transcript of Press Conference 7 November 2017; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12312-12315 (Christopher Pyne); Commonwealth, *Parliamentary Debates*, Senate, 13 November 2017 8149-8153 (George Brandis) and Commonwealth, *Parliamentary Debates*, Senate, 13 November 2017 8252-8255 (Scott Ryan).

Information, including documentation, from parliamentarians was incomplete by the prescribed deadline of 5 December 2017: 'Citizenship saga: Every foreign link to your MPs and whether they've shown proof' *ABC News* (online) 6 December 2017. Second, the scope of the citizenship register was inadequate—it needed to include grandparents and great grandparents (to cover citizenship by descent) and to require provision of documentary evidence, of a renunciation of foreign citizenship or allegiance.

Former Senator Ludlam: (2017) 263 CLR 284, 317-318; Former Senator Waters: (2017) 263 CLR 284, 318-319; Senator Roberts: (2017) 263 CLR 284, 320-321; Senator Nash: (2017) 263 CLR 284, 323-325; Hon. Barnaby Joyce: (2017) 263 CLR 284, 321-323.

⁸⁷ Senator Canavan: (2017) 263 CLR 284, 314-317; Senator Xenophon (2017) 263 CLR 284, 325-329.

retaining their seats. Senator Xenophon however resigned from the Senate in order to contest a seat in the South Australian state election.⁸⁸

2 Interpretive Choices: Framing and Contracting Future Possibilities

The Citizenship Seven case highlighted the range of interpretive choices open to the Court for s 44(i), as adopted in submissions by the Government, 89 the amici curiae, 90 Mr Tony Windsor 91 and counsel for the referred politicians. 92 The content of the different submissions presented plausible alternative interpretations of s 44(i) for the Court, each potentially providing for qualitatively different candidate participation in the constitutional system of representative government. The submissions highlighted the pivotal role of the Court in setting the limits of foreign citizenship disqualification under s 44(i) and in delimiting the bounds of candidature participation. How those factors were manifested would then prompt different Executive and Parliamentary institutional responses to the scope of that disqualification.

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⁸⁸ George Brandis, 'Senator Nick Xenophon' (Attorney General Media Release, 6 October 2017); Senator Xenophon's resignation created a s 15 Commonwealth Constitution casual vacancy which was filled by the SA Parliament accepting the nomination of his staffer, Rex Patrick, as his replacement: 'Nick Xenophon to be replaced in Senate by staffer at centre of submarine furore,' Sydney Morning Herald (Sydney) 31 October 2017. Mr Xenophon failed to be elected in his 2018 South Australian state election attempt.

Annotated Submissions of the Attorney General of The Commonwealth: No C11, C12, C13, C14, C15, C17, C 18 of 2017, High Court of Australia.

Annotated Submissions of the Amici Curiae: Nos C11, C17 and C18 of 2017, High Court of Australia.

⁹¹ Annotated Submissions of Mr Antony Harold Curties Windsor: Case C15 of 2017, High Court of Australia.

Annotated Submissions of the Hon. Barnaby Joyce MP No C 15 of 2017; Annotated Submissions of Senator Canavan No C 11 of 2017; Submissions for Scott Ludlam and Larissa Waters No C 12, C13 of 2017; Annotated Submissions of Senator Malcolm Roberts No C 14 of 2017; Submissions of Senator The Hon Fiona Nash No C 17 of 2017; Submissions of Senator Xenophon No C 18 of 2017.

The Government position, ⁹³ consistent with the comments of the Attorney General, ⁹⁴ was that the restrictions imposed by s 44(i) could not properly be read in a literal, or indeed, an irrational way. Instead, the s 44(i) disqualification must be given a more confined interpretation than its literal words. ⁹⁵ This position sought to adopt Deane J's and Gaudron J's accommodating criteria in *Sykes v Cleary*. ⁹⁶ *Three different variations* of this more liberal, creative approach of Deane J to the interpretation of s 44(i) restrictions emerged. ⁹⁷ The Court rejected the Government submission and its three variations. It unanimously ⁹⁸ accepted the approach advocated by the Amici Curiae ⁹⁹ and by counsel on behalf of Mr Windsor, ¹⁰⁰ as that interpretation was said to give

⁹³ See the discussion above under the headings 'The Executive's initial 2017 response to potential s 44(i) disqualification of Government members' and 'The foundational principles and guidance of *Sykes v Cleary*'.

⁹⁴ George Brandis, *Lateline* (ABC Television interview 14 August 2017).

⁹⁵ Ibid George Williams, 'Attorney-General's submission in citizenship cases a 'stretch'' Sydney Morning Herald (Sydney) 10 October 2017, 17: Part IV Summary of Argument parag 6 A-B Attorney General's submission, (n 89) strongly advocates a voluntary and subjective mental element in relation to the status, awareness of or acquisition of, foreign citizenship.

Sykes v Cleary (1992) 176 CLR 77; per Deane J (1992) 176 CLR 77, 114-130; per Gaudron J (1992) 176 CLR 77, 132-140. See the commentary above under the heading 'The foundational principles and guidance of Sykes v Cleary'. For analysis and commentary on the Deane J and Gaudron J judgments, see Gerard Carney, 'Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification,' (1999) 11 Bond Law Review 245, 248-249; Greg Carne, 'Kicking goals for democracy? The High Court and Sykes v Cleary' (1993) 67 Law Institute Journal 281, 282-283; Sarah O'Brien, 'Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution' Background Paper No 29 Commonwealth Parliament, Parliamentary Research Service, Department of the Parliamentary Library, (1992) 29-32; John Kalokerinos, 'Who May Sit? An Examination of the Parliamentary Disqualification Provisions of the Commonwealth Constitution', Papers on Parliament No 36, Commonwealth Parliament, Department of the Senate, (June 2001), 8-9, 12.

⁹⁷ See (2017) 263 CLR 284, 297-299, under the heading 'The competing approaches to the construction of s 44(i)'. Each of these variations required different levels of knowledge, consciousness or awareness of the actuality or possibility of foreign citizenship.

⁹⁸ Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

⁹⁹ Annotated Submissions of the Amici Curiae: (n 90).

¹⁰⁰ Annotated Submissions of Mr Anthony Harold Curties Windsor: (n 91).

s 44(i) its textual meaning, subject only to the implicit qualification in s 44(i) that the foreign law conferring foreign citizenship must be consistent with the constitutional imperative underlying that provision, namely that an Australian citizen not be prevented by foreign law from participation in representative government where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her foreign citizenship. 101

Four major reasons were advanced for this acceptance:

It adheres most closely to the ordinary and natural meaning of the language of s 44(i). It also accords with the views of the *majority* of the Justices in Sykes v Cleary...A consideration of the drafting history of s 44(i) does not warrant a different conclusion. Further, that approach avoids the uncertainty and instability that attend the competing approaches. ¹⁰²

Invoking the constitutional imperative as an implied qualification upon the operation of s 44(i), (in its textual sense) is framed as consistent with the *Sykes v Cleary* majority judgments. This contestable interpretation is presented as a linear development from existing case principles, and a methodology for the Court to avoid determination of questions based on subjective states of mind.

However, the *Citizenship Seven* case, in setting out the above justifications, subtly shifted from the more adaptable and open textured language of the *Sykes v Cleary* majority judgments. Those judgments potentially provided for highly differentiated findings, in reasonable steps to renounce nationality, based on the circumstances of the particular case. Instead, the four major reasons now advanced for acceptance, ¹⁰⁴ are justificatory of a textual meaning, rather than a purposive meaning. That interpretation diminishes the constitutional imperative to a distinctly residual operation.

^{101 (2017) 263} CLR 284, 297.

^{102 (2017) 263} CLR 284, 299

¹⁰³ See the discussion above, under the heading 'The foundation principles and guidance of Sykes v Cleary'.

¹⁰⁴ See the quotation from *Re Canavan* above, in the body of the article (n 102).

Moreover, the scope of that subtle shift remained unclear. Exactly how would the taking of all reasonable steps to renounce interact with the irremediable aspect of the foreign law preventing renunciation of foreign citizenship? How rigid would be the Court's developed threshold of evidence existing that steps had been taken towards renunciation? A tentative judicial balance had been struck making necessary the risk of foreign citizenship (including actions by foreign states) being effectively irrevocable by all reasonable means, as still preventing candidature in the system of constitutional representative government.

Personal characteristics of reasonableness in relation to taking steps for renunciation was clearly not the material question. 105 Instead, the reasonableness criterion attached to the actual taking of the steps 'required by foreign law to renounce his or her citizenship and within his or her power. 106 Issues about the completeness of all reasonable steps (as a finished and absolute process) in foreign law at the point of nomination remained unclear. Similarly unclear was whether a need existed to go through all reasonable steps, even where it was objectively most likely (perhaps evidenced by a similar, earlier case) that such attempted renunciation would prove futile. In other words, what exculpatory exceptionality of circumstance (if any) would be absorbed within the irremediable concept? Would the Court unanimously craft pragmatic principles in fleshing out the 'all reasonable steps' test of renunciation of citizenship in a subsequent case, 107 to provide a pragmatic gloss on the Citizenship Seven principles? The Court instead seemed to be sequentially closing off the

Re Canavan, (2017) 263 CLR 284, 311 'Where the personal circumstances of a would-be candidate gave rise to disqualification under s 44(i), the reasonableness of steps taken by way of inquiry to ascertain whether those circumstances exist is immaterial to the operation of s 44(i)'.

Re Canavan, (2017) 263 CLR 284, 313-314 'When the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged'.

^{107 (2018) 263} CLR 460 For example, in incorporating s 44(i) tolerances within 'all reasonable steps' for candidates who have correctly and expeditiously completed and submitted all renunciation documentation prior to nomination, but retain foreign citizenship at the point of nomination through the dilatoriness of foreign state renunciation processes.

more liberalised, accommodative interpretation possibilities for s 44(i) candidate participation, and imposing a higher threshold irremediable requirement.

B Re Gallagher — Lost Opportunities in Ensuring the Functionality of Representative Government?

Senator Katy Gallagher previously filled a casual Senate vacancy as an ACT Labor Senator from 26 March 2015. 108 Gallagher lodged her Senate candidate nomination form for the federal election of 2 July 2016 on 31 May 2016, and was returned as an elected ACT senator on 2 August 2016. At the date of her nomination for the 2016 federal election, Senator Gallagher was a British citizen. It was not until 16 August 2016 that Senator Gallagher's renunciation of British citizenship was registered by the UK Home Office. 109 On 6 December 2017, the Senate resolved that certain questions relating to the ACT Senate place for which Senator Gallagher was returned, should be referred to the Court of Disputed Returns. On 7 December 2017, the President of the Senate, pursuant to s 377 of the Commonwealth Electoral Act 1918 (Cth), referred a series of questions relating to Senator Gallagher's election to the Court of Disputed Returns. 110 Subsequently, Senator Gallagher submitted that upon provision on 20 April 2016 of her declaration of renunciation, or at the latest by 6 May 2016 (when her credit card was debited with the required fee) that she had taken every step within her power to renounce her British citizenship. 111 From that point, the cessation of her British citizenship was a matter entirely for the performance of duties by the UK Secretary of State under s 12 (1) of the British Nationality Act 1981. 112 The UK Secretary of State chose the time and manner in which the s 12 (1) duties would be performed, so this was said to be an irremediable impediment to Senator Gallagher's participation in the 2016 election. Senator Gallagher submitted that the constitutional

For an outline of the background circumstances leading to Senator Gallagher's referral to the Court, see the joint judgment of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ in *Re Gallagher* (2018) 263 CLR 460, 466-467.

¹⁰⁹ (2018) 263 CLR 460, 467.

¹¹⁰ Ibid.

¹¹¹ Ibid 470-471.

¹¹² Ibid 470.

imperative was therefore engaged, entitling her to participate in the 2016 election. 113

1 Judicial Constructions of the Taking of All Reasonable Steps Under Foreign Law and the Constitutional Imperative: Closing Off the Liberal and Accommodative Approach

In contrast with the position supportive of Coalition parliamentarians in the *Citizenship Seven* case, the Attorney General's submission now adopted a different approach. It sought to strictly confine the constitutional imperative attaching to s 44(i), with emphases on a 'natural and ordinary meaning', no subjectivity about the reasonableness of a candidate's efforts, and foreign law's operation focused on impossibility of renunciation. It drew upon principles *previously opposed* in the Attorney-General's *Citizenship Seven* case submission. The Commonwealth's retreat extended to movement from the accommodative *majority* approach of the joint judgment in *Sykes v Cleary* of Mason CJ, Toohey and McHugh JJ, and the separate judgments of Brennan J and Dawson J.

This closing off of liberalised, accommodative interpretational possibilities for s 44(i) candidature in *Re Gallagher* is confirmed in the Court's stringent approaches. First, the language of the present test, articulated in the *Citizenship Seven* case¹¹⁵ and applied in *Re Gallagher*, is derived from relevant parts of *Sykes v Cleary*¹¹⁶ and from

¹¹³ Ibid 470-471.

¹¹⁴ See Oral Outline of the Attorney General of the Commonwealth *Re Gallagher* No C 32 of 2017, 1; See also Annotated Submissions of the Attorney General of the Commonwealth No C 32 of 2017, 1-7.

¹¹⁵ Re Canavan (2017) 263 CLR 284, 313-314, 'a person who, at the time ... nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged'.

¹¹⁶ See the use of the 'reasonable steps' in the different judgments, but *particularly* Dawson J's focus on irremediable aspect at (1992) 176 CLR 77, 131, being 'that

the 1988 Constitutional Commission Report.¹¹⁷ The Court settled upon an interpretation that rejected more flexible, accommodative tolerances for renunciation, which appeared open to it. The more open textured approach in *Sykes v Cleary*, in reconciling the applicability of foreign laws as determinative of foreign citizenship, with steps necessary to renounce such citizenship (as protective of Australia's sovereign legislative interests from improper foreign government influence) was restrictively re-interpreted.

The Court's observations on the *Citizenship Seven* case are now in *Re Gallagher* less receptive of circumstances where the international law principle would *not* prevail. The Court considered in *Re Gallagher* an interpretive gloss upon the operation of the constitutional imperative exception, essential to understanding *Re Canavan*:

The first arises from the terms of the constitutional imperative. It is that a foreign law operates irremediably to prevent an Australian citizen from participation. The second is that that person has taken all steps reasonably required by the foreign law which are within his or her power to free himself or herself of the foreign nationality.¹¹⁹

A foreign law will not 'irremediably prevent' an Australian citizen from renouncing his or her foreign citizenship by the simple requirement to take particular steps successfully. For a foreign law to meet the description in *Re Canavan* and *Sykes v Cleary*, it must now present something of an *insurmountable obstacle*, such as a

s 44(i) should not be given a construction that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament'.

¹¹⁷ Constitutional Commission Report Volume 2 (n 16) 288 and recommendation of the Rights Committee (Advisory Committee to the Constitutional Commission): Constitutional Commission Report, Volume 2 (n 16) 287. Both of these references highlight disqualification because of unsought dual nationality.

^{118 &#}x27;The constitutional imperative thus requires that s 44(i) be seen as subject to an implicit qualification which gives effect to the constitutional imperative in circumstances where it may be said that the purpose of s 44(i) is met...In *Re Canavan*, the qualification to s 44(i) was expressed as an exception': Joint judgment, *Re Gallagher* (2018) 263 CLR 460, 472.

¹¹⁹ Ibid.

requirement that makes compliance impossible. Consistently with Re Canavan, the operation of the foreign law and its effect are viewed objectively.¹²⁰

The *Re Gallagher* joint judgment founded this exceptional standard upon a particularly strict interpretation of Brennan J's *Sykes v Cleary* approach to residual duties of allegiance and obedience under foreign law, ¹²¹ as enabling continued, potential influence over a dual citizen parliamentarian. This approach's high standard was rationalised as consistent with the purpose of s 41(i). ¹²² The joint judgment was explicitly unwilling to provide a more accommodative interpretation:

The constitutional imperative ... recognised [in *Re Canavan*] does not demand that s 44(i) be read so that its effects are more generally ameliorated so as to ensure the ability of foreign citizens to nominate. Its command is much more limited. It is, in terms, 'that an Australian citizen not be irremediably prevented by foreign law from participation in representative government.¹²³

It is not inevitable or incontrovertible that Brennan J's cited statements in *Sykes v Cleary* can be read with the severity asserted by the Court in the *Citizenship Seven* case¹²⁴ and later in *Re Gallagher*.¹²⁵ The Court's interpretive choice strongly links the reasonableness of steps to exhaustion of the specified foreign law requirements. It secondly, requires activation of those foreign law steps in almost all

¹²⁰ 'The exception stated in *Re Canavan* requires for its operation that foreign law operate in the way described...Both of the circumstances referred to in the passage from *Re Canavan* must be present for the exception to apply...for completeness, that all steps must be taken even though the foreign law will in any event operate to prevent renunciation being effected': Ibid 473.

¹²¹ As expressed in the extracts from Sykes v Cleary above – as included in the discussion above under the heading 'The foundational principles and guidance of Sykes v Cleary'.

¹²² Re Gallagher Joint judgment, (2018) 263 CLR 460, 473-474, 'To this may be added, consistently with the objective approach applied in Re Canavan, that it is not until it is manifest that a person has done all he or she can towards renunciation that the exception should apply.' (italics added).

¹²³ Ibid 474.

¹²⁴ See the judgment in *Re Canavan* (2017) 263 CLR 284, 306-307.

¹²⁵ See the *Re Gallagher* joint judgment, (2018) 263 CLR 460, 473-474.

circumstances, even where success in pursuing those steps will prove futile. Thirdly, it shifts emphasis from the reasonableness of steps (when those steps extend beyond unilateral renunciation of foreign citizenship) to the irremediable character of the foreign citizenship disqualification.

From the perspective of a judicial institution of government, the Court's choices in *Re Gallagher* will deter applications with otherwise arguable facts. Examples might be all reasonable steps being followed under the foreign law renunciation requirements by the applicant, where renunciation has not been formalised or acknowledged through foreign officials' dilatoriness or incompetence; inaccessible or intervening foreign law changes unknown upon formal submission of comprehensive and exhaustive foreign law renunciation documentation by the applicant; or the intervention of political considerations or actors in foreign states in slowing or obstructing the applicant's renunciation claim, for ulterior purposes.

The contraction thereby represented was shared by the other two justices in *Re Gallagher* — Gageler J and Edelman J — who similarly pressed the stringency of the constitutional imperative, its true operation being as an exception to s 44(i) disqualification. Gageler J emphasised the irremediable nature of the foreign law preventing renunciation of foreign citizenship, as critical to the operation of the constitutional imperative. ¹²⁶ Edelman J considered the constitutional imperative as deriving from the system of representative government in the manner of the implied freedom of political communication and voting rights, upon which 'significant, valid limitations...can be placed upon the ability to participate in representative government despite these implied freedoms'. ¹²⁷

^{126 (2018) 263} CLR 460, 476-477: 'The implied exception cannot be engaged unless and until such time as such process of renunciation as is provided for by the law of the other country can be characterised for practical purposes as a process that will *not permit* the person to renounce the foreign citizenship by taking reasonable steps'.

^{127 (2018) 263} CLR 460, 481 and 482, paragraphs 57 and 58. See also (2018) 263 CLR 460, 482, paragraph 59, for related observations. Further, the submission that any involvement of a foreign official's actions as a necessary step in the

The Court's applicable standard in *Re Gallagher* occasions considerable participatory consequences. These consequences include deterrence of potential candidates nominating who may be unable to complete the renunciation requirements prior to the close of nominations; potential candidates whose inability to complete renunciation of foreign citizenship prior to the close of nominations will affect a distribution of preferences; and more obscure forms of acquired and inherited citizenship potentially emerging after the otherwise successful election of a candidate, leading to a referral to the Court before the elected candidate has sat or during the currency of the Parliament. Within the constraints of the Court's constitutional interpretive role, the high irremediable thresholds regarding foreign citizenship renunciation constitute a significant shift from the more adaptive and accommodating approaches of *Sykes v Cleary*.

IV INTERPRETATION AND IMPLICATIONS: THE PARTICIPATORY RIGHTS OF ELECTORS AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

The Court's arrival at a high irremediable threshold for renouncing foreign citizenship may also be illuminated through the lens of constitutional implications regarding representative government. The interpretation of the irremediable requirement and the taking of all reasonable steps in the renunciation of foreign citizenship in *Re Gallagher* may be partly explained by parallel developments relating to the making of representative government derived constitutional

renunciation of foreign citizenship involved an unreasonable obstacle occasioned particular objection, as then the implication that an Australian citizen not be irremediably prevented by a foreign law from representative government participation was logically disconnected by the *mere circumstance* (not substantive unreasonableness) of that involvement: *Re Gallagher* (2018) 263 CLR 460, 484.

implications.¹²⁸ Representative government based constitutional implications may highlight a foregone capacity of the Court to have provided greater elasticity around the taking of all reasonable steps and where the irremediable point was reached. This is by providing a historical insight into why interpretations more inclusive of representative government participation were not arrived at. Similarly, existing implications regarding elector participatory rights, potentially analogous to representative participatory rights, are also relevant. Both issues deserve brief consideration.

A The Timing and Influence for s 44(i) of the Implied Freedom of Political Communication Methodology

This development might be explained by the timing by which earlier s 44(i) cases were decided alongside a framework of the making of representative government implications under the *Constitution*; in particular, the implied freedom of political communication. *Sykes v Cleary* was closely contemporaneous to the judgments in the initial implied freedom of political communication cases, *Australian Capital Television v Commonwealth*¹²⁹ and *Nationwide News v Wills*. ¹³⁰ In these initial cases, the implication making process from constitutional representative government differed noticeably amongst the High Court justices. ¹³¹

¹²⁸ As previously noted in the *Citizenship Seven* case, the Court in selecting its interpretation of the s 44(i) emphasised the 'textual' and 'the ordinary and natural meaning of the language of s 44(i)'.

¹²⁹ (1992) 177 CLR 106.

^{130 (1992) 177} CLR 1.

For example, Deane and Toohey JJ were prepared to read constitutional implications relating to representative government from doctrines said to underlie the *Commonwealth Constitution*: see *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 168 and *Nationwide News v Wills* (1992) 177 CLR 1, 70. Other justices, in particular Dawson J and McHugh J, took a narrower approach to the making of implications relating to representative government in the *Constitution*. On this point see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication,' (1999) 23 *Melbourne University Law Review* 668, 673 and Greg Carne, 'Representing Democracy or Reinforcing Inequality: Electoral Distribution and *McGinty v Western Australia*' (1997) 25 *Federal Law Review* 351, 357.

By the *Citizenship Seven* case, ¹³² and for the immediate future in *Re Gallagher*, ¹³³ the Court had settled a more contracted process for the making of representative government constitutional implications. This departed from the divergence of justices' opinions in the earlier implied freedom cases. The Court's unanimous judgment in *Lange v Australian Broadcasting Corporation* ¹³⁴ clarified the methodology, which resonates in the joint judgment in *Re Gallagher*:

Consistently with the limits which are accepted to apply with respect to the making of a constitutional implication, the qualification to s 44(i) can extend only so far as is necessary to give effect to the textual and structural features which support it. There is no warrant for reading it, or the constitutional imperative upon which it is based, more widely. The qualification operates in its own terms.¹³⁵

The limits and methodology of the constitutional implied freedom in *Lange* (upon which the joint judgment in *Re Gallagher* particularly relies)¹³⁶ were tied to the text and structure of the *Constitution*.¹³⁷

In turn, the *Lange* Court, in unanimously so confining representative government implications, relied upon extracts from the earlier judgments of Brennan CJ, Dawson J, McHugh J and Gummow

¹³² The issue of the making of constitutional implications relating to the representative government features of the *Constitution* is not specifically raised in the *Citizenship Seven* case.

¹³³ See the section of the judgments in *Re Gallagher* about the making of implications: *Re Gallagher*, (2018) 263 CLR 460, 472, paragraph 24.

^{134 (1998) 189} CLR 520, 566-567. See also cases commencing with Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 and Nationwide News v Wills (1992) 177 CLR 1 and more recently in Unions NSW v NSW (2013) 252 CLR 530; Tajour v New South Wales (2014) 254 CLR 508, McCloy v New South Wales (2015) 257 CLR 178 and Brown v Tasmania (2017) 261 CLR 328.

^{135 (2018) 263} CLR 460, 472 paragraph 24.

¹³⁶ Ibid footnote 34.

¹³⁷ Lange (1998) 189 CLR 520, 566-567. The last sentence of this extract indicates the contrived nature of consensual denial of past judicial difference as to legitimate sources of implications.

J in *McGinty v Western Australia*. These *McGinty* references ¹³⁹ ultimately inform and underpin the *Re Gallagher* judicial methodology. This preferred methodology narrowed the scope of the implication relating to representative government, rendered it more predictable, while also constraining the scope for judicial interpretation. ¹⁴⁰

In *McGinty*, Brennan CJ observed, '[implications] exist in the text and structure of the *Constitution* and are revealed or uncovered by judicial exegesis. No implication can be drawn from the *Constitution* which is not based on the actual terms of the *Constitution*, or on its structure.' McHugh J saw constitutional interpretation's commencement as the ordinary and natural meaning of the text, including an implication 'manifested according to the accepted principles of construction.' Structural implications also form part of the *Constitution*'s meaning, but are only able to be drawn when they are 'logically or practically *necessary* for the preservation of the integrity of that structure.' The cited supporting *McGinty* references also relevantly identified the minimalist qualities of

¹³⁸ (1996) 186 CLR 140. See *Lange* (1997) 189 CLR 520, 567 footnote 270, citing *McGinty* (1996) 186 CLR 140 at 168, 182-183, 231, 284-285. This was described as 'a conservative approach to constitutional interpretation' and sets limits to interpretive method: see Stone (n 131) 675.

For an analysis of the revised limits and methods of deriving implications in McGinty from the Commonwealth Constitution, see Lindell, (n 46) 128, 134; Carne (n 131) 359-360 and Stellios (n 46) 561.

¹⁴⁰ See Stone (n 131) 843.

¹⁴¹ Brennan CJ (1996) 186 CLR 140, 168.

¹⁴² McHugh J (1996) 186 CLR 140, 231.

¹⁴³ McHugh J (1996) 186 CLR 140, 231 (emphasis added). 'Necessity' naturally limits the scope and discretion to make representative government implications based on structural characteristics. See Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 Sydney Law Review 505, 513, observing that whilst McHugh J considered the Constitution as giving effect to key elements of representative government, it was 'illegitimate for the Court to draw inferences from a freestanding concept of representative government that is independent of the text and structure of the Constitution'.

¹⁴⁴ (1996) 186 CLR 140. See *Lange* (1997) 189 CLR 520, 567 footnote 270, citing *McGinty* (1996) 186 CLR 140 at 168, 182-183, 231, 284-285.

constitutional representative government. Ange, and the judgments correspondingly referred to in *McGinty*, again rejected that representative government implications could be judicially conceived through underlying constitutional doctrines.

B The Timing and the Influence for s 44(i) of Judicial Dissent in the Voter Participation Rights Cases

Further illumination regarding s 44(i) interpretation of *elected* representative participation rights, may be obtained from the Court's contrary approach to elector participation rights. An apparent inconsistency exists between the Court's majority approach to representative government derived elector rights, to the absence of an implication of representative participation rights tempering the all reasonable steps and the irremediable requirement. Some would argue that both representative government issues should be interpreted similarly. Differences might be explained through temporal and Court compositional issues.

In the elector participation cases of *Roach v Electoral Commissioner*, and *Rowe v Electoral Commissioner*, the High Court narrowly divided around processes and permissible limits of implication making from representative government. The majority instituted a test involving proportionality elements. In *Roach v*

Dawson J (1996) 186 CLR 140, 182, observing that there is only 'an irreducible minimum requirement that the people be governed by representatives elected in free elections by those eligible to vote'. Sections 1, 7, 8, 16, 24 and 30 provided for the minimum requirements of representative government: (1996) 186 CLR 140, 182. See also Gummow J (1996) 186 CLR 140, 285.

¹⁴⁶ In particular the judgments of Dawson J and McHugh J in *McGinty*.

¹⁴⁷ See the references of Dawson J at (1996) 186 CLR 140, 181, 182 to Mason CJ, Toohey and Gaudron JJ in *Theophanous* (1994) 182 CLR 104, 123; and to Deane and Toohey in *Australian Capital Television* (1992) 177 CLR 106, 168 as a preliminary to Dawson J's difficulty with such a conception: (1996) 186 CLR 140, 182; and the reference of McHugh J to Deane and Toohey JJ in *Nationwide News* (1992) 177 CLR 1, 70 as a preliminary to McHugh J's difficulty with such a conception: (1996) 186 CLR 140, 232.

^{148 (2007) 223} CLR 162.

¹⁴⁹ (2010) 243 CLR 1

Electoral Commissioner, ¹⁵⁰ a majority ¹⁵¹ determined that the 2006 amendments to the Commonwealth Electoral Act 1918 (Cth), which disqualified as voters for federal elections persons who were serving sentences of imprisonment, regardless of duration, for an offence against Commonwealth, State or Territory laws, were invalid. Exclusion from an adult suffrage franchise required a substantial reason, ¹⁵² not presently established. ¹⁵³ In Rowe v Electoral Commissioner, ¹⁵⁴ a majority of the Court ¹⁵⁵ found invalid ¹⁵⁶

^{(2007) 223} CLR 162. The fundamental question was that 'disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people...that of course raises questions as to what constitutes a substantial reason': (2007) 223 CLR 162, 174 per Gleeson CJ.

¹⁵¹ Gleeson CJ, Gummow, Kirby and Crennan JJ; Hayne J and Heydon J dissented in separate judgments.

The use of the word 'substantial' in this context originates from the judgment of Brennan CJ in *McGinty*. Within the application of a proportionality test, a substantial reason would be established if it was reasonably appropriate and adapted for an end consistent or compatible with the maintenance of the constitutionally prescribed system of representative government: Gleeson CJ (2007) 223 CLR 162, 174; Gummow, Kirby and Crennan JJ (2007) 223 CLR 162, 202.

¹⁵³ Gummow, Kirby and Crennan JJ (2007) 223 CLR 162, 199, 202. For analysis and discussion of Roach v Electoral Commissioner (2007) 223 CLR 162, see Graeme Orr and George Williams, 'The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia' (2009) 8 (2) Election Law Journal 123; Nicholas Aroney, 'Towards The 'Best Explanation' of The Constitution: Text, Structure, History and Principle In Roach v Electoral Commissioner' (2011) 30 University of Queensland Law Journal 145; Cornelia Koch and Lisa Hill, 'The Ballot Behind Bars After Roach Why disenfranchise prisoners?' (2008) 33 Alternative Law Journal 220 and Elisa Arcioni, 'The Core Of The Australian Constitutional People – 'The People' As 'The Electors' (2016) 39 University of New South Wales Law Journal 421, 438-441.

^{154 (2010) 243} CLR 1.

French CJ, Gummow and Bell JJ and Crennan J; Hayne J, Heydon J and Kiefel J dissented.

As failing the proportionality test's service of a legitimate end consistent with the maintenance of the constitutionally prescribed system of representative government - French CJ (2010) 243 CLR 1, 20, 21-22, 38; per Gummow and Bell JJ (2010) 243 CLR 1, 59, 61; per Crennan J (2010) 243 CLR 1, 118, 119. For discussion and analysis of *Rowe v Electoral Commissioner* (2010) 243 CLR 1, see Graeme Orr, 'The Voting Rights Ratchet: *Rowe v Electoral Commissioner*' (2011) 22 *Public Law Review* 83 and Ruth Greenwood, 'A Progressive Court and a Balancing Test: *Rowe v Electoral Commissioner* [2010] HCA 46' (2010) 14 *University of New South Wales Law Journal* 119.

Commonwealth Electoral Act 1918 (Cth) amendments contracting the closing dates for new voters to be included on the electoral roll and change of address transferee voters to be updated on the electoral roll.

The processes about representative government implications by the *Roach* and *Rowe* majority decisions, extending participatory rights of voters, attracted significant criticism regarding impermissible constitutional method. Criticism emerged in dissenting judgements¹⁵⁷ and in academic commentary. Such criticism may have diverted the Court from a broader representative government iteration, underpinning candidate participation, in s 44(i) foreign citizenship cases.

The majority decisions were criticised as representing an evolutionary doctrine¹⁵⁹ of constitutional interpretation – that an evolved concept of representative government in liberalising voting rights was non reversible,¹⁶⁰ entrenching constitutional doctrine and limiting parliamentary power from retracting the franchise in the future.¹⁶¹ Concerns were raised about previous parliaments changing the meaning of the *Constitution*,¹⁶² with reasoning upon unclear community based concepts.¹⁶³ Critique of the evolutionary approach also highlighted the contrasting originalist interpretive approaches of the minority, who in claiming a more orthodox textual and structural approach, derived content legitimacy from within the *Constitution*.¹⁶⁴

¹⁵⁷ In *Roach*, Hayne J and Heydon J; in *Rowe*, Hayne J, Heydon J and Kiefel J.

¹⁵⁸ See, for example, Anne Twomey, 'Rowe v Electoral Commissioner – Evolution or Creationism' (2012) 31 University of Queensland Law Journal 181; Aroney, (n 153) 145; Orr (n 156).

For discussion of evolutionary interpretation, see Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 Adelaide Law Review 49, 52.

¹⁶⁰ Sometimes known as constitutional ratcheting: Orr (n 156) 88.

¹⁶¹ See Twomey (n 158) 181, 184, 185, 189; Orr (n 156) 88; Graeme Orr and George Williams (n 153) 124.

¹⁶² Twomey (n 158) 189.

¹⁶³ Orr and Williams (n 153) 136, 138.

¹⁶⁴ Twomey (n 158) 191; Orr and Williams (n 153) 133; Aroney (n 153) 163.

Claims also arose about false interpretive reliance on conventional constitutional text and structure, as masking freestanding personal views in majority judgment reasoning¹⁶⁵ and selectively citing supporting judgments.¹⁶⁶ There were concerns about the logical sustainability of the majority judgments' common legislative understandings as to who can vote and the proportionality test;¹⁶⁷ and in inherent limitations of text and structure in yielding substantive content from representative government provisions.¹⁶⁸ It can be speculated that breadth of these criticisms curtailed a slightly more accommodative, policy inspired moderation of s 44(i) disqualification by implications.

In contrast, the *Roach* and *Rowe dissenting* judgments presage the more recent s 44(i) interpretive choices, around sections 7 and 24 representative government implications. The present s 44(i) reasoning *reflects principles of the most prominent, influential dissentient in the elector participation cases, Hayne J. The time gap between the 2008 <i>Roach* and 2010 *Rowe* majority findings and the 2017-2018 s 44(i) cases 171 has eased this adoption.

Hayne J's judgments incisively object to the idea that sections 7 and 24 forms of 'directly chosen by the people' are resolvable by reference to earlier case principles of the 'common understanding of

¹⁶⁷ Orr and Williams (n 153) 138.

¹⁶⁵ Aroney (n 153) 149.

¹⁶⁶ Ibid.

Aroney (n 153) 156. See also Orr and Williams (n 153) 136, 139, similarly claiming the need for a stronger justification.

¹⁶⁹ Significantly, Kiefel J (as she then was) dissented in Rowe v Electoral Commissioner.

¹⁷⁰ See the discussion above under the heading 'Re Gallagher – Lost Opportunities in Ensuring the Functionality of Representative Government?'.

¹⁷¹ A further point is that the present Chief Justice Kiefel was a dissenting justice in the Rowe case.

the time',¹⁷² or 'generally accepted Australian standards'.¹⁷³ First, the 'difficulty of determining what those standards are and to what extent they are generally accepted.'¹⁷⁴ Second, that accepted principles of constitutional construction meant that the scope of constitutional powers was not determined by the contemporary politically acceptable limits to suffrage.¹⁷⁵ Anticipating these points, His Honour had earlier distinguished the form of representative government, grounded in constitutional text and structure, provided for by the *Constitution*, from 'a democratic theory which exists and has its content independent of the constitutional text'.¹⁷⁶

Hayne J elaborated upon these themes in *Rowe v Electoral Commissioner*, ¹⁷⁷ reinforcing his earlier views that the *concept* of representative government does not provide or guide the content of the federal constitutional system.

Importantly, His Honour cited in this case four majority judgments in *McGinty v Western Australia*¹⁷⁸ - those of Brennan CJ,¹⁷⁹ Dawson J¹⁸⁰ McHugh J,¹⁸¹ and Gummow J¹⁸² supporting this proposition.¹⁸³

¹⁷² See McTiernan and Jacobs JJ in *Re McKinlay* (1975) 135 CLR 1, 36: 'The words chosen by the people of the Commonwealth fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not or would not in the event of an election, be chosen by the people within the meaning of these words in s 24'.

¹⁷³ A synonymous term advanced by Hayne J – see Roach v Electoral Commissioner (2007) 233 CLR 162, 218.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 218.

¹⁷⁶ Ibid 214.

^{177 (2010) 243} CLR 1.

^{178 (1996) 186} CLR 140. The four McGinty judgments are cited by Hayne J in *Rowe* at (2010) 243 CLR 1, 69.

¹⁷⁹ Ibid 169.

¹⁸⁰ Ibid 182-183.

¹⁸¹ Ibid 234.

¹⁸² Ibid 269 per Gummow J.

¹⁸³ Significantly, the citations of the individual judges and their page references are close to the citations picked up in the Lange citation in Re Gallagher: Re

The selected *McGinty* judgments, expounding interpretive methodology around the voter entitlements aspect of representative government, link these principles to a similar selection by the Court in the political communication aspect of representative government, ¹⁸⁴ and its exposition of interpretive method, to commonly underpin implication making boundaries. ¹⁸⁵

In contrast, in *Murphy v Electoral Commissioner*, ¹⁸⁶ the Court applied the relevant *majority standard* of substantial reasons from *Roach* and *Rowe*. However, it unanimously concluded that closure of the electoral rolls was consistent with the sections 7 and 24 *Constitution* requirements of direct choice of members of the Senate and the House of Representatives. ¹⁸⁷ Particular emphasis was given to the regularity and order afforded by the provisions for participation in the representative government electoral system. ¹⁸⁸

Section 44 (i) qualifications on candidature are properly considered as interwoven with the Court's interpretive developments relating both to the implied freedom of political communication and to restrictions

Gallagher (2018) 263 CLR 460, 472, footnote 17 and Lange (1998) 189 CLR 520, 567 footnote 270.

¹⁸⁴ See the discussion under the heading 'Timing and influence for s 44(i) of the implied freedom of political communication methodology' in the Court's use in the unanimous *Lange* judgment, of the same four *McGinty* judgments – those of Brennan CJ, Dawson J, McHugh J and Gummow J.

¹⁸⁵ See in particular the use of Gummow J's McGinty judgment (1996) 186 CLR 140, 269, 279 by Hayne J in Rowe (2010) 243 CLR 1, 69-70. Gummow J observed that a constitution embodying a principle of representative government 'adopts a category of indeterminate reference, the phrase 'directly chosen by the people of the Commonwealth' is a broad expression identifying the requirement of a popular vote': (1996) 186 CLR 140, 279.

^{186 (2016) 261} CLR 28.

French CJ. Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ all upheld as valid provisions of the *Commonwealth Electoral Act 1918* (Cth), which suspended the addition of names to, or alteration of particulars in, electoral rolls following closure seven days after the issue of election writs.

^{See French CJ and Bell J (2016) 261 CLR 28, 54; Kiefel J at (2016) 261 CLR 28, 64; Gageler J at (2016) 261 CLR 28, 72; Keane J at (2016) 261 CLR 28, 87, 89; Nettle J at (2016) 261 CLR 28, 110 and Gordon J at (2016) 261 CLR 28, 128-129.}

applying to enfranchisement. Representative government matters involving implications – foreign citizenship as not being permitted to raise an irremediable impediment to participation as a candidate and elected member, the implied freedom of political communication, and exclusion from the electoral roll, *have each activated interpretive choices* about the influence of the constitutional system of representative government from sections 7 and 24 of the *Commonwealth Constitution*.

Based on the earlier and restrictive approaches to implications, the Kiefel Court's interpretive choice in the s 44(i) cases has similarly confined representative government as an interpretive influence. The constitutional imperative works peripherally to confine the operation of s 44(i). The reasoning in the recent s 44(i) cases as consistent the dissentient Hayne J's methodology in *Roach* and *Rowe*.

The Kiefel Court did not adapt the broader methodology regarding representative government implications from the majority's dealing with *voter participation* to the related subject of *candidate participation* involving foreign citizenship renunciation. Interpretive techniques around representative government text and structure, liberalising the 'reasonableness' in taking of all reasonable steps to divest foreign citizenship, and decreasing the point at which irremediable prevention of divestiture of foreign citizenship would occur, were not applied.¹⁸⁹

A broader context of the Court's present restrictive orientation (which was still able to be accommodated in *Murphy v Electoral Commissioner*) arose in the contemporary case of *Re Culleton [No 2]* (2017) 263 CLR 176, firstly endorsing that a (different) s 44 disqualification must be read consistently with the *Lange* reference (See *Re Culleton* [No 2] (2017) 263 CLR 176, 196 footnote 49 – the discussion relates to s 44 (ii) of the *Constitution*) and further, that order and certainty in the electoral process accords with the *Commonwealth Constitution*'s system of representative and responsible government (See *Re Culleton* [No 2] (2017) 263 CLR 176 196, footnote 50, which notably makes various references to *Sykes v Cleary* (1992) 176 CLR 177 and *Murphy v Electoral Commissioner* (2016) 261 CLR 28.

V JUDICIAL RATIONALISATION AND METHOD REGARDING INTERPRETIVE CHOICES

A Judicial Rationalisation of Interpretive Choices — an Illusion of Predictability and Certainty

Linked closely to these factors influencing the Kiefel Court's s 44(i) interpretive choices, was the justification of predictability and certainty of result, against competing approaches. ¹⁹⁰ Predictability and certainty guided nomination to seek election and for the electors to assess nominee electability. Certainty for elector assessment of nominees was prominent in *Sykes v Cleary*. ¹⁹¹ Likewise in *Re Culleton [No 2]*, ¹⁹² Nettle J focused on the need for a certain electoral process. ¹⁹³

A second justification reflects the Court's institutional conception as an actor within the system of representative government. Order, regularity and finality of elected candidature was an important representative government value. Including subjective elements within a s 44 constitutional test was to be avoided as creating uncertainty, making judicial determination difficult. Stability was paramount, weighing 'against an interpretation ... which would alter the effect of the ordinary and natural meaning of its text by introducing the need for an investigation into the state of mind of a candidate'. 194

¹⁹⁰ Re Canavan (2017) 263 CLR 284, 299 paragraph 19: 'Further, that approach avoids the uncertainty and instability that attend the competing approaches'.

¹⁹¹ There it ruled out the options of a candidate resigning from an office of profit after nomination, but before the declaration of the poll, or failing to resign and then be disqualified: (1992) 176 CLR 77, 100 per Mason CJ, Toohey and McHugh JJ; See also Brennan J (1992) 176 CLR 77, 108, Dawson J (1992) 176 CLR 77, 130 and Gaudron J (1992) 176 CLR 77, 132.

^{192 (2017) 263} CLR 176.

¹⁹³ Ibid 195-196: 'the disqualification imposed by s 44 (ii) must be read in light of the system of representative and responsible government...An understanding of s 44 (ii) as requiring order and certainty in the electoral process accords with that system'.

¹⁹⁴ See *Re Canavan* (2017) 263 CLR 284, 307.

The Court settled on a distinctive approach to s 44(i) disqualification on the basis of all forms of being a foreign citizen or subject, regardless of the extent of knowledge, constructive notice or personal suspicion. The Court was exempted from assessing the credibility of politicians' claims averting s 44(i) disqualification. It was insulated from potential direct criticism of findings regarding politicians having to be made around a claimed state of foreign citizenship knowledge. It is advantageous in expediting the resolution of claims as a Court of Disputed Returns. Interpretive severity and clarity also deters numbers of future referrals of contested parliamentary membership to the Court from the Parliament itself, narrowing jurisprudential development. Fewer referrals, with less judicial engagement, might be interpreted as maintaining the Court's independence and integrity.

Pursuing predictability and certainty has proven somewhat illusory for the Court. It has reduced articulating coherent policy rationales for foreign citizenship disqualification, against s 44(i)'s spare language. That reduction starkly contrasts with the exhaustive demands upon those seeking to take all reasonable steps, (including engaging in formal processes relating to prospective renunciation which are unlikely to be successful) to satisfy irremediable prevention by foreign law of candidature participation in the representative government system.

Contrarily, the Court's methodology may enliven s 44(i) disqualification by foreign citizenship uncertainty, through the irremediable test's rigidity. That methodology might not provide a sufficiently workable and practical test, resulting in short term (that is, immediate controversies over potential disqualification) and long term (that is administrative, legislative or constitutional reform) s 44(i) issues. The resulting default position of resolution of s 44(i) issues by the Executive and Legislative branches, invests the problem in those institutions with interests potentially at odds with integrity and accountability-based models. The Court's seeking of certainty and predictability shifts resolution of foreign citizenship issues to the other

arms of Government, which have an inherent, bi-partisan self-interest of finding candidature compatibility with s 44(i).

The fact of ongoing issues is evident from the Register of Senators' qualifications and the Register of Members' qualifications. Recent information derived from the Parliamentary Qualifications Registers points to an altered, but continuing, set of issues around s 44(i) disqualification. 195 The May 2019 election suggested that numbers of candidates, including from the major parties, had ongoing citizenship concerns 196

1 The Interpretive Choice of a High Irremediable Threshold — Difficulties with Predictability and Certainty

The major difficulty arising with the Court's emphasis upon predictability and certainty emerges from the rigidity of the high threshold irremediable criterion, intersecting with more opaque forms of entitlement and inheritance of foreign citizenship. The limits of the Court's interpretative choice becomes obvious at this point. The claimed credibility of the Court's interpretive method as preserving judicial legitimacy is qualified, as complex foreign citizenships might prove irresolvable in a manner compatible with community expectations of representative government. Predictability and certainty from this interpretive choice is not as straightforward as the Court indicates. Pivotal is the principle of reliance on foreign law as determinative of citizenship — necessarily, the Court has continuing interaction with the application of those foreign laws within Australia.

A starting point is the multiple ways in which citizenship can be acquired under foreign law — by descent, place of birth, marriage and positive acts to acquire citizenship or declare allegiance, 197 each

¹⁹⁶ Ibid.

¹⁹⁵ See 'Revealed: ALP's citizenship cloud' The Australian (Sydney) 14 August 2019 and 'More federal MPs under foreign citizenship cloud' The Australian (Sydney) 14 August 2019.

¹⁹⁷ Graeme Orr, 'Fertilising A Thicket: Section 44, MP Qualifications and The High Court' (2018) 29 Public Law Review 17, 18.

governed by relevant foreign law.¹⁹⁸ The various methods of acquisition of citizenship, depending upon relevant individual foreign law, provide a foundation for various other representational issues to attach to.

At a most fundamental level, the resolution of foreign candidature issues can only be made after an actual election — through a challenge under the *Commonwealth Electoral Act*, or by a referral to the Court by either House of Parliament. The critical point, of course, for not holding dual nationality is the point of nomination for election - but issues surrounding potential disqualification traverse politics from nomination, election and post-election. ²⁰²

Ensuring compliance with the s 44(i) requirement may involve significant and expensive genealogical and legal resources, ²⁰³ including legal advice from the relevant foreign jurisdiction, ²⁰⁴ prior to submitting an application for renunciation, before candidature nomination. These requirements assume adequate lead time prior to calling of an election and nomination closure, in order to effect renunciation, given the vagaries of different foreign government processes.

¹⁹⁸ Because of space considerations, the s 44(i) further issue of 'entitled to the rights or privileges of a subject or citizen of a foreign power' is not considered in this article. Interestingly, the Court did not consider this aspect in further assessing issues around Senator Canavan's eligibility to sit in the Senate, following its determination 'On the evidence before the Court, one cannot be satisfied that Senator Canavan was a citizen of Italy': (2017) 263 CLR 284, 317 paragraph 86.

¹⁹⁹ Jeremy Gans, 'Anne Aly and the insurmountable obstacle' *Inside Story* (11 May 2018), 5; Jeremy Gans, 'News: The High Court on dual citizen MPs' *Melbourne Law School Opinions on High*, (20 July 2017).

²⁰⁰ Commonwealth Electoral Act 1918 (Cth) s 355. There is a time limit of 40 days for filing a petition with the High Court Registry by candidates or electors, in the case of a s 44 challenge: s 355 (c) of the Commonwealth Electoral Act 1918 (Cth)

²⁰¹ Commonwealth Electoral Act 1918 (Cth) s 376.

²⁰² Jeremy Gans, 'Second class surnames' *Inside Story* (26 April 2017), 6.

²⁰³ Ibid 5.

²⁰⁴ Orr (n 197) 18.

Political candidature circumstances are frequently not so straightforward. Elections may be called with relatively short notice. Political parties may need to replace candidates, if and when endorsed candidates step aside, including for foreign citizenship issues. A broader participatory conception of representative government suggests that independent, minor party, and interest group candidates should be able to readily and equally engage in federal elections. Potentially long lead times to investigate and resolve foreign citizenship issues arguably have a disproportional impact on these candidates, in accessing expertise and absorbing expense. 205 A deterrent²⁰⁶ or chilling effect may therefore arise for the fullest and most diverse candidate participation in the system of representative government. The demands of pre-emptively avoiding s 44(i) disqualification are more easily absorbed by the major political parties with greater finances and legal resources, reflecting an indirect discriminatory impact upon other candidates. The only offset is that such candidates are less likely, in the first place, to be elected. On the other hand, cross bench representation may hold the balance of power in the Senate, or indeed help to form minority government in the House of Representatives.²⁰⁷

Other factors are also important in assessing predictability and certainty in the s 44(i) selected interpretive approach. Around half the Australian population has at least one overseas born parent,²⁰⁸ so the Court's interpretive approach has a horizontally broad impact. In

The expenses personally incurred by the Labor Senate candidate Sam Dastyari to resolve Iranian citizenship issues were around \$25,000: See 'Section 44 forcing politicians into extraordinary intrepidity' ABC News (on line) 29 July 2017.

²⁰⁶ Jeremy Gans, 'News: The High Court on dual citizen MPs' Melbourne Law School Opinions on High, (20 July 2017); Gans (n 202) 5; Jeremy Gans, 'The Mikado in the Constitution: Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2] Re Joyce; Re Nash; Re Xenophon [2017] HCA 45', Melbourne Law School Opinions on High, (30 October 2017), 7-8.

²⁰⁷ The growth of independent and minor party Members in the House of Representatives in recent years reflects greater disenchantment with major party politics, raising again issues around the consequences of the Court's interpretive choices. The Gillard minority government was formed with cross bench support from independents Tony Windsor and Rob Oakeshott.

²⁰⁸ Gans, 'Anne Aly and the insurmountable obstacle' (n 199) 3.

future, that approach will be likely to engage more complicated foreign citizenships, reflecting a generational shift in the diversity of Australia's population. This is in contrast to the relatively straightforward renunciation processes applying in first world, common law jurisdictions.²⁰⁹ A comparative political inconsistency is the greater accommodation for election to most State parliaments — foreign allegiance or citizenship only potentially disqualifies for positive acts done post election.²¹⁰ In Victoria, the ACT and the Northern Territory, even this form of disqualification does not arise.²¹¹

The Court's reliance upon applying foreign laws as determinative of citizenship for s 44(i) masks variable characteristics, in its implementation. Importantly, foreign law can change²¹² — either legislatively, or retrospectively through judicial interpretation. The point is temporal — an existing state of not holding a foreign nationality prior to candidature nomination may change for subsequent elections. This might occur by judicial re-interpretation of a previously exclusionary citizenship law, or conferral by liberalising legislative changes.

The Court's stated principle regarding foreign law application is not as straightforward as presented. More accurately, 'Although citizenship of another country will be decided primarily according to the law of that country, the High Court will not defer absolutely to that foreign law: the question is ultimately subject to our own constitutional judgment'²¹³ This itself accounts for the exception that 'where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by

²⁰⁹ Ibid 3-4.

²¹⁰ Orr (n 197) 22; Carney (n 11) 94.

²¹¹ Carney (n 11) 94.

²¹² Gans (n 199) 4.

²¹³ Tony Blackshield 'The Unfortunate Section Forty Four' (2018) 29 Public Law Review 3, 9; Anne Twomey, 'Section 44 of the Constitution – What Have We Learnt and What Problems Do We Still Face?' (2017) 32 (2) Australasian Parliamentary Review 6, 15; Tony Blackshield, 'Seven little Australians and counting,' (2017) 40 Law Society Journal 70, 72.

foreign law from participation in representative government'. ²¹⁴ Minimal judicial examples were given of exceptions to the application of foreign law in resolving a s 44(i) problem. ²¹⁵ This lack of clear illustrative examples, combined with the future reservation to the Court to find an instant example meeting the irremediable standard, creates an element of uncertainty.

The Court's continuing function in assessing the applicability of foreign law to resolve s 44(i) citizenship issues,²¹⁶ is best illustrated in that Senator Canavan was not disqualified by reason of foreign citizenship.²¹⁷ The Court's selected Italian law interpretation required the individual taking positive steps²¹⁸ to acquire Italian citizenship. That approach was chosen over citizenship merely flowing from a non-discriminatory 1983 re-interpretation by the Italian Constitutional Court, of a law previously restricting inheritance of citizenship to the male line.²¹⁹ Further, the Court's capacity to use foreign citizenship law to resolve s 44(i) issues may be subject to curtailment. Legislative enactment, based the non-treaty relations with other states aspect of

²¹⁴ Re Gallagher (2018) 263 CLR 460, paragraph 25, quoting from Re Canavan.

The major example provided is in *Re Canavan* (2017) 263 CLR 284, 313, '...a requirement of foreign law that the citizens of a foreign country may renounce their citizenship only by acts of renunciation carried out in the territory of the foreign power. Such a requirement could be ignored by an Australian citizen if his or her territory could involve risks to person or property. It is not necessary to multiply examples of requirements of foreign law that will not impede the effective choice by an Australian citizen to seek election to the Commonwealth Parliament'; Edelman J in *Re Gallagher* (2018) 263 CLR 460, 480, referring to Brennan J in *Sykes v Cleary*, stated 'One of those was described as 'an extreme example, if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all'. In cases of such exorbitant foreign laws both public policy and international law require that foreign law not be recognised.' See also Gans, 'The Mikado in the Constitution', (n 206) 7; Gans, 'News: The High Court on dual citizen MPs' (n 206) Jeremy Gans, 'The hesitators' *Inside Story* (13 November 2017), 2.

²¹⁶ Twomey (n 213) 16.

^{217 &#}x27;On the evidence before the Court, one cannot be satisfied that Senator Canavan was a citizen of Italy': (2017) 263 CLR 284, 317; Twomey (n 213) 15; Blackshield (n 213) 5.

²¹⁸ In identifying a positive act, a distinction was made between registration as an Italian Resident Abroad for voting purposes, and the declaration of Italian citizenship: (2017) 263 CLR 284, 317; Carney (n 11) 98; Twomey (213) 15.

²¹⁹ (2017) 263 CLR 284, 315-316; Twomey (n 213) 14-15.

the s 51(xxix) external affairs power, may achieve this. As Gaudron J observed in *Sykes v Cleary*:

Whatever limits on legislative power are imported by s 44(i) it does not, in my view, limit the power of Parliament to provide to the effect that, if prior foreign citizenship has been renounced in compliance with Australian law, the law of the country concerned should not be applied for any purpose connected with Australian law, including the determination of any question arising under s 44(i) itself, unless that prior citizenship has been reasserted.²²⁰

The use of the External Affairs power might appear as a Commonwealth law allowing for a statutory declaration of renunciation of all foreign citizenship to be sufficient for the purposes of Australian law. ²²¹

The irremediable standard assumes both continuity in the Court role in resolving how and when foreign law is applied to determine foreign citizenship, but further that the Court will continue as the *prime institution* for s 44(i) resolution. This is a contestable proposition. It is possible, but unlikely, that the Parliament could modify or repeal s 355 of the *Commonwealth Electoral Act 1918* (Cth), allowing determination of matters of qualifications to revert to an intraparliamentary matter. Both the House of Representatives and the Senate have successfully moved bi-partisan supported motions to restrict parliamentary referrals to the Court of Disputed Returns, within a set of significantly narrowed and prescribed procedures.

²²⁰ (1992) 176 CLR 77, 137.

²²¹ Carney (n 11) 101-102.

²²² Under the process in s 355 of the Commonwealth Electoral Act 1918 (Cth) (petition by a candidate or elector, within 40 days of the return of the electoral writs) or the process in s 376 of the Commonwealth Electoral Act 1918 (Cth) (referral by resolution of the Senate or the House of Representatives).

²²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 April 2019, 14898 -14900 (Alex Hawke).

²²⁴ Commonwealth, *Parliamentary Debates*, Senate, 3 April 2019, 10641-10643 (Matthias Cormann); Commonwealth, *Parliamentary Debates*, Senate, 3 April 2019, 10643 (Deborah O'Neill)

²²⁵ Senators and Members may not move a motion to refer any question to the Court of Disputed Returns under section 376 of the Commonwealth Electoral Act 1918 (Cth) unless the relevant committee has considered whether the matter be so

Referrals are contingent upon the relevant committee finding a sufficient doubt about a parliamentarian's qualifications, ²²⁶ and a recommendation that a section 376 *Commonwealth Electoral Act* referral be made to the Court of Disputed Returns.

That recommendation is constrained to the relevant committee's determination that the question arises from facts not disclosed in accordance with Part XIV of the *Commonwealth Electoral Act* (nomination procedures, including qualification checklist).²²⁷ When a qualifications question turns solely upon the interpretation or application of foreign citizenship law, the committee shall not recommend referral of the question to the Court of Disputed Returns unless it has taken evidence from relevant foreign law experts. It must further consider that a sufficient possibility exists that the parliamentarian was a foreign citizen under the foreign law at the relevant time. ²²⁸

The Court's interpretive choice as avoiding 'the uncertainty and instability that attend the competing approaches' is clearly contestable. Gaps in the Court's ability, through its interpretive

referred and reported to the Senate or the House of Representatives, as the case may be. After the relevant committee has made such a report, a Senator or Member may, without notice, move to refer the matter to the Court of Disputed Returns.

Qualifications are now assessed against a Qualifications Checklist – see Schedule 1 Form DB to the Commonwealth Electoral Act 1918 (Cth), as amended by the Electoral Legislation Amendment (Modernisation and Other Measures) Act 2019 (Cth). A series of questions include citizenship by descent (parents and grandparents), citizenship through current and former spouses and similar partners, individual citizenship of a country other than Australia and renunciation of that citizenship.

²²⁷ See sections 170 A, 170 B, 181 A and 181 B of the Commonwealth Electoral Act 1918 (Cth), included by the Electoral Legislation Amendment (Modernisation and Other Measures) Act 2019 (Cth).

²²⁸ For the above steps in the processes of the House of Representatives and the Senate, see the Statements 'Members' Qualifications' and 'Senators' Qualifications' respectively at Commonwealth, *Parliamentary Debates* House of Representatives, 4 April 2019, 14898-14899 and Commonwealth *Parliamentary Debates* Senate 3 April 2019, 10641 -10643.

²²⁹ (2017) 263 CLR 284, 299.

choices, to satisfactorily resolve s 44(i) matters will cause the policy issue to default to the Executive and Legislature. The above recent changes, implemented by passage of the *Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2019* (Cth) and by Senate and House of Representatives motions, illustrates this development.

2 The Kiefel Court Consensus Approach: A Contributory Factor to Predictability and Certainty Issues

Issues of certainty and predictability by the Court supporting its interpretive choice should also be considered from a perspective of the Court's decisional dynamics. The consensus driven approach of the Kiefel High Court, with an unusually high number of joint judgments and a low number of judicial dissents, has attracted commentary. ²³⁰ This is noteworthy given the unanimous judgment in the *Citizenship Seven* case²³¹ and in the five judge joint judgment and two separate concurring judgments in *Re Gallagher*.

Particular Kiefel Court characteristics seem apposite in resolution of s 44(i) matters. One is the emphasis upon consensual decision making, 232 including the speed of delivery of judgments and where

²³⁰ Jeremy Gans 'The Great Assenters Are we the losers in the High Court's quest for consensus?' *Inside Story* (1 May 2018).

²³¹ This comprised a brief 44 pages of text, methodically divided between 23 pages resolving constitutional principles and 20 pages applying those constitutional principles to the circumstances of individual parliamentarians, the process of filling the vacancies and the conclusions made in relation to legal questions referred to the Court in three different forms. The Court dealt with the complex s 44(i) issues with relative speed, delivering judgment on 27 October 2017.

^{232 &#}x27;High levels of agreement on constitutional cases before High Court in 2017' Media Net AAP (23 February 2018 UNSW Sydney); 'Kiefel Court' delivers unusually high consensus on constitutional matters' Australasian Lawyer (24 February 2018); Andrew Lynch, 'The High Court on Constitutional Law: The 2017 Statistics', Paper distributed at Gilbert and Tobin Centre of Public Law UNSW 2018 Constitutional Law Annual Conference (Sydney, 23 February 2018); Andrew Lynch, 'The High Court on Constitutional Law; the 2018 Statistics', Paper distributed at Gilbert and Tobin Centre of Public Law UNSW 2019 Constitutional Law Annual Conference (Sydney, 15 February 2019).

dissent is a serious, exceptional thing, for the most important cases.²³³ Consensus can work against more accommodative solutions, reducing judicial engagement and scope for discretion, important in practically resolving issues such as meeting the selected test. A normative curial framework of reasoning and consensus, with peer expectations of few individual concurring judgments or dissents, is unlikely to produce creative, latitudinal resolution of difficult, topic sensitive and time pressured s 44 matters.

A further factor is the voting bloc of Kiefel CJ, Bell J and Keane J, and its high consensual levels in decision making influencing Court orders.²³⁴ Kiefel CJ has articulated policy reasons²³⁵ for collaborative decision making approaches²³⁶ observing that

Certainty in the law is a strong reason for limiting the number of judgments in a given case ... collegiality is not compromise ... Agreeing with another's judgment is as much an act of independence as is the writing of one's own judgment. It may involve greater discipline... for the most part reasonable attempts should be made to reduce the number of judgments in any matter. It is the institutional responsibility of the members of a court to do so, in pursuit of clarity, certainty and timeliness.²³⁷

The Chief Justice's statement again reflects contiguous values of regularity, restraint, order and moderation, reflected in the *Citizenship Seven* and *Re Gallagher* adjudication. This challenges conventional wisdom around judicial independence in writing individual judgments. It reifies collective institutional values of certainty and timeliness when resolving s 44 disqualification cases.

²³³ Gans (n 230).

²³⁴ Ibid.

²³⁵ 'Vanity sidelined for "unprecedented unanimity" by the High Court' *Australian Financial Review* (Sydney) 22 February 2018.

Hon Justice Susan Kiefel 'Judicial Methods in the 21st Century,' Supreme Court Oration (Banco Court, Supreme Court, Brisbane) 16 March 2017, 8.

²³⁷ Hon Justice Susan Kiefel, 'The Individual Judge' (2014) 88 Australian Law Journal 554, 560.

In the longer term, a more flexible, adaptive approach might sustain better the Court's credibility. Section 44(i) decisional uniformity appears to be portrayed by the Court as rational, linear and functional. However, that interpretive choice may be inadequately connected to sustaining representative government, outsourcing the practical resolution of policy s 44(i) foreign citizenship issues to the Executive and the Parliament. The institutional consequences of such choice appear anterior to interest or comprehension within the consensus model.

A critical question arises as to the compromised legitimacy of these institutions regarding constitutional compliance in candidate nomination alongside the institutional self interest in circumscribing the s 44(i) guarantee. Consideration will now be given to Australian studies of community confidence in and attitudes toward representative government institutions and practices. These studies confirm a need to carefully craft remedial responses to s 44(i) issues, informed by interests transcending those of federal politicians disqualified through citizenship issues.

VI CONTEMPORARY REPRESENTATIVE GOVERNMENT STUDIES: RELEVANCE FOR SHAPING REPRESENTATIVE GOVERNMENT RESPONSES TO S 44(i) ISSUES

A Studies Regarding Community Confidence in and Attitudes towards Representative Government Institutions and Practices

Recent Australian based studies have indicated surprising levels of dissatisfaction with representative government parliamentarians, institutions and practices. The s 44(i) parliamentary disqualification

examples may properly be considered against the findings and context of these studies, to assist in shaping desirable reforms.²³⁸

The ANU Election Study of the 2016 federal election, ²³⁹ offers some striking results demonstrating surprisingly high levels of dissatisfaction with aspects of the Australian representative government system, ²⁴⁰ marking adverse changes since 2007. Forty per cent of respondents were not satisfied with democracy. Fifty two per cent of respondents said that politicians don't know what ordinary people think. Trust in government was seriously contested – seventy four per cent of respondents believed that people in government looked after themselves. Fifty six per cent of respondents considered that government is run for a few big interests. Only forty per cent of respondents indicated that they always vote for the same party. Fifty eight per cent of people thought that who people vote for can make a big difference.

The 2017 *Scanlon Foundation study*²⁴¹ provides revealing background on representative government issues in its chapter 'Democracy'.²⁴² In relation to the question 'How often do you think the government in Canberra can be trusted to do the right thing for the Australian people?" only 29 per cent of respondents answered either

 ²³⁸ Such dissatisfaction has also arisen from a frequent changing of Prime Ministers
 Coalition and Labor – by the parliamentarians, rather than by the electorate.

²³⁹ This study is part of a broader longitudinal study, which commenced with the 1987 election. See Sarah Cameron and Ian McAllister, 'Trends in Australian Political Opinion Results from the Australian Election Study 1987-2016 School of Politics and International Relations,' School of Politics and International Relations ANU College of Arts and Social Sciences (2016). See also '2016 Australian Election Study' (ANU Media Release 17 January 2017) and Sarah Cameron and Ian McAllister, 'Trust, Parties and Leaders: Findings from the 1987-2016 Australian Election Study,' Paper presented in Senate Occasional Lecture Series (Parliament House, Canberra 25 August 2017).

²⁴⁰ The major relevant findings are located in the chapter 'Democracy and institutions' in 'Trends in Australian Political Opinion Results from the Australian Election Study 1987-2016, ibid.,73-83.

²⁴¹ Andrew Marcus, Mapping Social Cohesion The Scanlon Foundation surveys 2017 (Scanlon Foundation, 2018).

²⁴² The Scanlon Foundation included 15 questions on Australian democracy: See the 'Democracy' chapter in Ibid 36-45.

'almost always' or 'most of the time'. A further question asked respondents if 'the system of government we have in Australia works fine as it is, needs minor change, needs major change, or should be replaced'. Some 41 per cent of 2017 respondents were of the view that the system needs major change or should be replaced, ²⁴³ with the category 'needs minor change' declining between 2014 and 2016.

Low trust in institutions of parliament and political parties has been largely consistent in surveys.²⁴⁴ The 2013 Scanlon Foundation survey 'asked respondents to rank nine institutions or organisations in the level of trust ... Trade unions, federal parliament and political parties were the lowest ranked indication of 'a lot of trust' (ranging from) 9 per cent in trade unions, 7 per cent in federal parliament and 3 per cent in political parties. 'The question, with some change in the institutions specified,²⁴⁵ was repeated in 2015 and 2017 ... There was little difference in the rankings and proportions indicating trust ... Almost identical with 2013, just 2 per cent indicated 'a lot of trust' in political parties', the 2017 combined level of trust in political parties being 31 per cent. The survey then hypothesised that 'the lack of trust in the political system may in part reflect the failure to legislate on issues supported by a majority of electors', namely (at the 2017 survey) medically approved euthanasia, reduced reliance on coal for electricity generation and marriage equality for same sex couples.²⁴⁶

The 2018 *Grattan Institute study* is also relevant to the representative government system.²⁴⁷ Its reform recommendations commence with the premise that 'Australian political institutions are generally robust, but there is room for improvement. At times, special

²⁴³ High proportions of such respondents indicated straightened financial circumstances, poverty or just getting along: Ibid 39.

²⁴⁴ Ibid 41.

²⁴⁵ Federal parliament and trade unions were deleted from the relevant institution list for the 2017 survey. The introduction in the 2017 survey of the High Court of Australia as an institution found it attracted a high level of trust – The High Court recorded 69 per cent of the combined categories of 'A lot of trust' and 'Some trust': Ibid 41.

²⁴⁶ Ibid.

²⁴⁷ Danielle Wood and Kate Griffiths, Who's in the room? Access and influence in Australian politics (Grattan Institute Report September 2018).

interests have used the tools at their disposal — donations, lobbying and public campaigns — to push policy towards their interests at the expense of the public interest.' The study's critical message is that the notion of public interest in decision making is mediated, assessed and adjudicated by politicians and public officials, that access to and the provision of information will better inform decision making and also provide greater accountability.²⁴⁹

The report makes various recommendations, 250 important to representative government functionality, to ameliorate undue or improper influence in decision making, focusing on 'transparency, accountability and boosting alternative voices in policy debates'. 251 Three proposals were directed towards improving transparency: publishing ministerial diaries; provide linkage of the lobbyists' register with access to Parliament House sponsored security passes, along with creating a more meaningful register of lobbyists; and improve the visibility of political donations.²⁵² Strengthened accountability measures were proposed around politicians' ethics: setting clearly codified standards to avoid conflicts of interest, independent arms-length administration of those standards, and the establishment of a federal integrity or anti-corruption body.²⁵³ Facilitating greater equality in the dispersal of money and resources, influencing policy debates, was essential — for example, a cap on political advertising expenditure, and more inclusive policy review processes actively seeking out a range of voices.²⁵⁴

The 2018 study *Trust and Democracy In Australia*²⁵⁵ revealed several negative attributes about the conduct of contemporary

²⁴⁸ Ibid 4 and 12.

²⁴⁹ Ibid 68.

²⁵⁰ 'Proposals for reform' are set out at Ibid 56-68.

²⁵¹ Ibid 56.

²⁵² Ibid 57-59.

²⁵³ Ibid 60-62.

²⁵⁴ Ibid 63-68.

²⁵⁵ Gerry Stoker, Mark Evans and Max Halupka, Trust and Democracy In Australia Democratic decline and renewal Democracy 2025 Report No 1 (Museum of Australian Democracy and University of Canberra December 2018).

Australian representative democracy and politics. A majority of Australians expressed dislike of conflict driven politics at the federal level, in particular day to day political operations. Federal, State and Local Government commands trust from the population in the low thirty per cents, and Ministers and members of parliament at 21 per cent. Over 60 per cent of Australians believe the honesty and integrity of politicians is very low, while trust in political parties was recorded at a mere 16 per cent. These indices of a low level of trust appear linked to the perceived disconnection of federal politics from the everyday lives of Australians, including the behaviour of politicians and the lack of delivery of programs and promises. The authors conclude:

Australians imagine their democracy in a way that demonstrates support for a new participatory politics but with the aim of shoring up representative democracy and developing a more integrated, inclusive and responsive democratic system. In the light of this discovery, we argue that an effective path to reform is not about choosing between representative and participatory democratic models but of finding linking arrangements between them. ²⁵⁶

How *might* the s 44(i) foreign citizenship disqualifications *potentially relate* to these perceptions and views of the Australian population? A balanced appraisal needs to account for the range of complicating factors contesting the Court's refusal to adopt a test of real, objective or constructive awareness of foreign citizenship.

However, the referral of large numbers of parliamentarians to the Court created a *public perception* of serial irregularity and incompetence in party administrations meeting electoral obligations, including the tangible issue of voting preferences not being translated into constitutionally elected representation. The 2017 referrals of parliamentarians to the Court were debated in an intensely political way, focusing on personalised circumstances of alleged s 44(i) breaches.²⁵⁷ Immediate political distraction arose in pursuing

²⁵⁶ Ibid 12.

²⁵⁷ 'Dual citizenship: Which politicians still have questions to answer in this constitutional mess?' *ABC News* (online) 22 November 2017); 'Citizenship

politicians with questionable citizenship status.²⁵⁸ Awareness of inertia in the failure to examine and debate past Committee recommendations might have exacerbated in electors an exceptionally low public opinion of politicians.²⁵⁹ Second, electoral awareness of the readily adoptable reform proposals from the three s 44 reports²⁶⁰ may have generated political momentum — expending political time and capital — in cultivating bi-partisan support for practical referendum proposals, ousting intense political contestation around alleged s 44(i) breaches.

Such perceptions are not unwarranted upon examination of the clear and simple s 44 AEC material (as available to potential candidates who were subsequently challenged regarding s 44(i) foreign citizenship issues). On line accessibility of these instructive materials means it is unremarkable that public consciousness be affronted by the numbers of parliamentarians encountering s 44(i)

crisis: Greens back Turnbull's move to refer Labor MP's to High Court' *ABC News* (online) 13 November 2017.

²⁵⁸ 'Citizenship saga: Every foreign link to your MPs and whether they've shown proof' *ABC News* (online) 6 December 2017.

See the above discussion under the heading 'Studies Regarding Community Confidence in and Attitudes towards Representative Government Institutions and Practices'. '2016 election study shows both major parties "on the nose" *The Australian* (Sydney) 21 December 2018; 'Confidence in democracy hits record low as Australians 'disaffected with political class' 'ABC News (online) 20 December 2016; 'Sick of politics: Ten charts that show why Donald Trump and Brexit could happen in Australia' Sydney Morning Herald (Sydney) 20 December 2016 and 'Out of touch, out of time: voters lose patience' Sydney Morning Herald (Sydney) 3 November 2017, 4.

²⁶⁰ See the earlier discussion under the heading, 'The three Parliamentary Committee and Constitutional Commission reports: reviews of Section 44 (i)' on the 1981, 1988 and 1997 reviews.

In particular, Australian Electoral Commission (AEC) Nomination Guide for Candidates Federal Parliamentary Elections (12 May 2016), 3: 'disqualified by section 44 of the Constitution'; see also Australian Electoral Commission (AEC) Electoral Backgrounder on Constitutional Disqualifications and Intending Candidates (April 2010) available at < www.aec.gov.au >; Ibid paragraph 12 'Qualifications and disqualifications' and paragraphs 17-23 'Section 44(i) of the Constitution' and paragraph 24 'Information for dual or plural citizens'; Australian Electoral Commission (AEC) Electoral Backgrounder: Parliamentary Report on Section 44 of the Constitution (April 2010) available at < www.aec.gov.au>.

issues, referrals to the Court or resignations, pre-empting referral. That affront reflects a *perception* of too casual (or oblivious) noncompliance with nomination requirements. It presents as a failing to take representational responsibilities seriously, or setting different standards for observing the law, than routinely imposed on the community by legislators. Beyond immediate events, it was primed by suggestions of politicians being unconcerned by community standards and legal accountability until found out.²⁶² Non-compliance with s 44(i) requirements may be perceived as an extension, communicating indulgence and insufficient accountability.

The studies of Australian representative government²⁶³ are disarming, raising serious issues of public confidence around functionality and integrity, its representatives, institutions and practices. Section 44(i) reform proposals ideally need to re-integrate more substantive representational civic values in the electoral relationship between voter and representative, focus upon required levels of legal compliance, and maintain the constitutional character of s 44(i). Caution should be exercised in embracing a purely parliamentary sovereignty model overwhelmingly reflecting the perspectives of Executive and parliamentary committee members. That model is unlikely to strongly reflect norms of accountability and legal compliance, nor necessarily address community expectations.

²⁶² Examples include claims of misuse of parliamentary travel allowance and claimed allowances that whilst technically legal, were considered improper, indulgent or excessive by community standards. Prominent examples arose in 2015 and 2016 in relation to Hon Bronwyn Bishop, Speaker of the House of Representatives and Hon Sussan Ley, Minister for Health, Aged Care and Sport. See Commonwealth of Australia, Department of Finance Report An Independent Parliamentary Entitlements System Review (February 2016); Commonwealth of Australia Department of Finance Report Travel and Independent Parliamentary Entitlements System Review (February 2016); Commonwealth of Australia Department of Finance Report Travel Related Work Expenses of the Hon Sussan Ley MP (September 2013-January 2017) (January 2017).

²⁶³ See also reference to the further Institute of Public Administration Australia survey in Jessica Irvine, 'The Democracy Blues,' *Sydney Morning Herald* (Sydney), 19 November 2018, 8.

VII A FURTHER REVIEW OF S 44(i) DISQUALIFICATION

A Responding to the s 44(i) Cases by Contemporary Review: The 2018 Joint Standing Committee on Electoral Affairs Review

The 2018 parliamentary review of s 44²⁶⁴ commenced in the aftermath of the *Citizenship Seven* case. Political pragmatism, rather than advocating primary constitutional reform, was evidenced by the inquiry terms of reference to the Joint Standing Committee. This included an initial innocent focus upon what administrative and legislative changes could be made towards a more efficacious operation of s 44(i).²⁶⁵

The terms of reference overplayed legislative capacity to reform the qualifications of members of the House of Representatives²⁶⁶ and of the Senate.²⁶⁷ Both powers are in turn subject to the restraining power of s 44(i), plainly by the relevant Part IV heading²⁶⁸ and by the s 44 heading; and indeed by preceding s 44(i) decisions, as the Parliament

²⁶⁴ Excluded The impact of section 44 on Australian democracy (n 39).

²⁶⁵ The inquiry terms of reference largely ignored a need for s 128 referendum reform:

A. How *electoral laws and the administration thereof* could be improved to minimise the risk of candidates being found ineligible pursuant to section 44 (i) (this could involve, among other matters, a more comprehensive questionnaire prior to nominations, or assistance in swiftly renouncing foreign citizenship)

B. Whether *the Parliament* is able *to legislate* to make the operation of section 44 (i) more certain and predictable (for example, by providing a standard procedure for renunciation of foreign citizenship, or by altering procedures for challenging a parliamentarian's qualifications in the Court of Disputed Returns)

C. Whether the Parliament should seek to amend section 44 (i) (for example, to provide that an Australian citizen born in Australia is not disqualified by reason of a foreign citizenship by descent unless they have acknowledged, accepted or acquiesced in it) (emphasis added throughout).

²⁶⁶ s 34 of the Commonwealth Constitution.

²⁶⁷ Section 16 of the Commonwealth Constitution 'The qualifications of a senator shall be the same as those of a member of the House of Representatives'.

²⁶⁸ Part IV – Both Houses of the Parliament.

had at the time of those decisions, otherwise provided for nominee qualifications under s 34 of the *Constitution*, through the *Commonwealth Electoral Act 1918* (Cth).²⁶⁹

The Committee referral with the Prime Minister's terms of reference was significant, ²⁷⁰ as the absence of a constitutional referendum in the terms of reference was consistent with the Prime Minister's earlier views. ²⁷¹ Omitting from terms of reference the three preceding inquiries was significant, as these inquiries specifically recommended s 128 constitutional change. ²⁷²

1 The Majority Joint Standing Committee Report: A Critical Appraisal

The Joint Standing Committee Report was released in late May 2018.²⁷³ It has interrelated sets of reform options, comprising

²⁶⁹ See Commonwealth Electoral Act 1918 (Cth) s 163 for 'Qualifications for Nomination: (1) A person who has (a) reached the age of 18 years; (b) is an Australian citizen; and (c) is either (i) an elector entitled to vote at a House of Representatives election; or (b) a person qualified to become such an elector; is qualified to be elected as a Senator or a member of the House of Representatives.'

²⁷⁰ See Joint Standing Committee on Electoral Matters, Parliament of Australia, Inquiry into matters relating to Section 44 of the Constitution : 'On 28 November 2017, the Prime Minister referred matters relating to section 44 of the Constitution for inquiry and report'.

²⁷¹ See 'Brutal literalism': Brandis critiques High Court and contradicts PM on reform' *The Guardian* (Sydney) 29 October 2017; George Brandis, 'Interview with Peter van Onselen and Paul Kelly' (Attorney General Media Transcript, 29 October 2017); Malcolm Turnbull, 'High Court Decision and Ministerial Arrangements' (Prime Minister Media Release, 27 October 2017); Malcolm Turnbull, 'High Court Decision and Ministerial Arrangements' (Prime Minister Media Transcript Press Conference Sydney, 28 October 2017). Former Prime Minister Malcolm Turnbull's extra-parliamentary statements regarding reform of s 44(i) should be read subject to the content of the terms of reference for the Joint Standing Committee on Electoral Matters (n 270). See also Malcolm Turnbull, 'Joint Standing Committee On Electoral Matters to Examine Operation of Section 44' (Prime Minister Media Release, 29 November 2017).

²⁷² See the above discussion under the heading 'The three Parliamentary Committee and Constitutional Commission reports: reviews of Section 44(i)'.

 $^{^{273}\} Excluded\ The\ impact\ of\ section\ 44$ on Australian democracy (n 39).

administrative reforms,²⁷⁴ legislative and procedural reforms²⁷⁵ and the constitutional options of amendment of s 44²⁷⁶ or repeal of s 44.²⁷⁷

The Committee ultimately recommended that sections 44 and 45 be reformed by constitutional referendum – either the repeal of ss 44 and 45, or that the words 'Until the Parliament otherwise provides' be added. Assuming a successful referendum, it was further recommended that *the government then engage* 'with the Australian community to determine contemporary expectations of standards in order to address all matters of qualification and disqualification for Parliament through legislation under section 34 of the Constitution'. Should that referendum not proceed or not pass, 'the Australian government should consider strategies to mitigate the impact of section 44 as outlined in this report'. an obvious reference to the administrative reforms and legislative and procedural reforms earlier in the report.

These are the formal aspects of the majority report. More telling for reform proposals after the *Citizenship Seven* case and *Re Gallagher* (as they relate to parliamentarian perceptions of representative government) are the *informal assumptions and incidental commentary of the Committee* in its perceptions of problems and related issues. The majority report strongly externalises responsibility for breaches of s 44(i), centred upon the drafting of the provision, and the Court's interpretation at odds with the contemporary democratic expectations.

The report's title — Excluded The impact of section 44 on Australian democracy, seemingly communicates a sense of outrage by

²⁷⁴ Ibid 65-72.

²⁷⁵ Ibid 73-83.

²⁷⁶ Ibid 84-86.

²⁷⁷ Ibid 86-90.

²⁷⁸ Ibid 102, parag 5.44 and Recommendation 1 (emphasis added).

²⁷⁹ Ibid 102, Recommendation 2.

²⁸⁰ Ibid 103, Recommendation 3.

²⁸¹ Ibid 65-72 Option 2 Administrative reforms and Ibid 73-82, Legislative and procedural reforms.

Committee members that numbers of parliamentarians were disqualified because of dual citizenship issues the Court found as contrary to s 44(i), including other breaches of s 44(ii)²⁸² and s 44(v).²⁸³ The report's title implicitly states Parliament's primacy through its popularly elected members, a simple representative government conception, rather than a broader conception of representation accountable to the Court under the *Constitution*.

The Committee majority report gathers and adopts a series of submission inquiry points of undesirable policy consequences for the continuing presence, or retention in current form, of s 44. Various submission points are absorbed in the majority report under the headings Option 2 — Administrative reforms²⁸⁴ and Option 3 — Legislative and procedural reforms. ²⁸⁵ In what emerges as the majority report major recommendations ²⁸⁶ submission points are used to construct a narrative identifying responsibility for the numbers of s 44(i) disqualified politicians, within the provision's rigid constitutional requirements. This attribution to the Court's interpretation means a new legislative capacity to ensure representation capability and continuity consistent with contemporary community standards is required. Advocating that Parliamentary legislative capacity be enhanced led to the recommendations for referenda to either repeal sections 44 and 45 of the Constitution or insert into sections 44 and 45 the words 'Until the Parliament otherwise provides.'

The majority report's arguments fail to properly balance, or make concessions, around the adequacy of political party, or individual

²⁸² Re Culleton No 2 (2017) 263 CLR 176.

²⁸³ Re Day (2017) 263 CLR 201.

²⁸⁴ See, for example, submissions at pages 67, 68 and 70 and further at pages 71 and 72 of *Excluded The impact of section 44 on Australian democracy* (n 39).

²⁸⁵ See, for example, Ibid submissions cited separately at pages 74, 75, 76, 77, 78, 81, 82, 83 and 85.

²⁸⁶ Ibid Recommendation 1 paragraph 5.45 'The Committee recommends that the Australian Government prepare a proposed referendum question to either: repeal sections 44 and 45 of the Constitution; or insert into sections 44 and 45 the words 'Until the Parliament otherwise provides...'.

candidate processes, in taking proactive and prudential steps to satisfy the s 44(i) requirements. Contrition or humility are similarly understated. The individual responsibility of candidates and parliamentarians is merely mentioned as follows:

The Committee accepts the argument that those standing for election have a responsibility to ensure that they are properly qualified to do so. The Committee considers that this responsibility has not always been taken sufficiently seriously in the past.²⁸⁷

This minor, almost peripheral concession, is confirmed by the majority report's conclusion 'that there is no viable alternative other than amending the Constitution.' Increased administrative assistance in assessing candidate eligibility and other measures are then dismissed

The majority report de-emphasises or minimises any personal responsibility for s 44(i) compliance.²⁹¹ Its rationalising focus is towards policy aspects of inclusion, equality and participation as candidates in Australian representative democracy, with the present operation of s 44 no longer achieving its original constitutional purpose.²⁹² This methodology shifts the focus from personal politician and party political processes (with the associated s 44 compliance

²⁸⁷ Ibid paragraph 5.24, 99.

²⁸⁸ Ibid paragraph 5.23, 98.

²⁸⁹ Ibid paragraph 5.24, 99. This aspect had earlier in the report received significant attention, including submissions about existing assistance and that candidates needed to exercise due diligence prior to nomination: see Ibid 66-67.

These included the proposal for unilateral renunciation of foreign citizenship (likely to be constitutionally ineffective following the Court's decision in Sykes v Cleary (1992) 176 CLR 77) and the re-assertion by the Commonwealth Parliament of s 47 of the Commonwealth Constitution for the Senate and House of Representatives to self-resolve issues of individual qualification without referring the matter to the Court of Disputed Returns.

²⁹¹ The issue of personal responsibility of politicians for s 44(i) non compliance was raised in some submissions from constitutional law academics: see Professor Anne Twomey (*Excluded The impact of section 44 on Australian democracy* (n 39) 62-63); Professor Cheryl Saunders, Ibid 92 and Lorraine Finlay Ibid 93.

²⁹² Aspects of these items are reflected in the commentary in Ibid 95-97.

issues)²⁹³ to the institutional and procedural relationship between the Australian people and their representatives.

In doing so, the recent disqualification issues are intimated as outside of Parliament's making. Parliamentary representative government is portrayed as the both the victim and the solution of these developments. This produces a need for quite specific constitutional reforms, allowing parliamentary enactment of legislation governing disqualification of candidature, repealing sections 44 and 45 of the *Constitution* (creating a default reliance upon sections 16 and 34 of the *Constitution*) or by prefacing sections 44 and 45 of the *Constitution* with the words 'Until the Parliament otherwise provides...', permitting legislative override of the constitutional disqualification.

The majority report envisages the relationship of parliamentary representative government to the people as firmly hierarchical and procedural. A top down, instructive form of representative government is communicated. Only after referendum passage does the Committee consider dialogue of government with the represented people as appropriate:

Should a referendum be successful, it must then be followed by a public, and parliamentary debate on what constitutes appropriate Parliamentary disqualifications. A referendum process should make clear to voters that the removal or amendment to ss 44 and 45 is a necessary prerequisite to that debate.²⁹⁴

²⁹³ Refer also to the reference to the clear and simple AEC on line material readily available to then potential candidates, in Part VI A above, 'Studies Regarding Community Confidence in and Attitudes towards Representative Government Institutions and Practices' and (n 261).

²⁹⁴ Excluded The impact of section 44 on Australian democracy (n 39) 101, Recommendation 2 'If the referendum passes, the Committee further recommends that the Australian Government further engages with the Australian community to determine contemporary expectations of standards in order to address all matters of qualification and disqualification for Parliament through legislation under section 34 of the Constitution.' See also (n 261).

This is an assertive, pre-emptive framing of debate conditions with the Australian people. It assumes a superior hierarchical relationship of the representatives to their electors, rather than the electors, as a sovereign Australian people, accorded primacy in remedial measures. This hierarchical reform process may deflect attention from the represented Australian peoples' scepticism about a referendum.²⁹⁵ The majority Committee report positions the Commonwealth Parliament, freed of constitutional restrictions, as the solution to representative disqualification issues – expanding Commonwealth executive scope in legislative drafting around disqualification.

It does so against a backdrop of two factors. First, an obvious, indulged practice of some, but not all parliamentarians, failing to take adequate measures to check ancestral and foreign legal system issues about potential disqualification on the basis of dual citizenship. Second, the bi-partisan failure of many Executives and governments, since 1981, to act on the content of three reports to avert predictable circumstances. ²⁹⁶

The majority 2018 report unselfconsciously indulges represented elector good will and trust in government. Framed by this history, its recommendations can be seen as ascribing blame for s 44(i) difficulties disproportionately to institutions, rather than individuals, or to the machinery of political parties. It substantively advocates the Parliament (in practice an Executive able to obtain majority Senate support) in future to write the rules about parliamentary disqualification. Such an outcome risks a quite partisan environment, open to abuse for a parliamentary majority attempting to exclude certain classes of persons from candidature.

²⁹⁵ Excluded The impact of section 44 on Australian democracy (n 39) 101 'The Committee acknowledges that a referendum will not be positively received by Australians and the outcome of any referendum is uncertain'.

²⁹⁶ See the discussion of the reports under the heading 'The Three Parliamentary Committee and Constitutional Commission reports: reviews of Section 44 (i)', above.

2 The Minority Joint Standing Committee Report: Remediation through Responsibility

The contrary view, acknowledging some similar issues, was advanced by the Committee's minority report by the member for Tangney, Ben Morton MP. The minority report appears significantly more attuned to community sentiment and in balancing individual personal and political responsibility for the s 44(i) disqualification issues²⁹⁷ with a lack of support for referendum change. This report opposes the removal of the disqualification provisions from the *Commonwealth Constitution*, and the giving of that power to the Parliament, on various grounds – that it would then leave open the possibility of dual citizen parliamentarians,²⁹⁸ that it would remove from the Australian people a direct say in who should be disqualified as members of Parliament,²⁹⁹ and that the terms of the referendum proposal to confer enhanced parliamentary power pre-empts proper deliberative consultation with the Australian people.³⁰⁰

The minority report ultimately favours certain administrative and procedural reforms involving obligatory disclosures and the Privileges Committee as precursors to referrals to the Court;³⁰¹ and, if further necessary, a constitutional referendum confined to changing the relevant point of disqualification from nomination to being sworn in.³⁰² Accordingly, the minority report has greater focus upon practical remediation, the possibilities of successful referendum reform, and humility towards and acknowledgment of the important role of the represented, the sovereign Australian people.

²⁹⁷ Excluded The impact of section 44 on Australian democracy (n 39) Minority Report, 139, 147-148.

²⁹⁸ Ibid 140.

²⁹⁹ Ibid 141.

³⁰⁰ Ibid.

³⁰¹ Ibid 156.

³⁰² Ibid 159, 161.

VIII CONCLUSION

A Reforming and Responding to Important s 44(i) Judicial, Executive and Parliamentary Issues Within a Framework of Representative Government

The multiple referrals to the Court and its decisions in two major s 44(i) cases confirm an ongoing educative tradition, for political parties, parliamentarians and the Executive. Constitutional representative government form a lynchpin interpretive point and in its institutions — executive and legislative — interact with and are affected by the referred s 44(i) matters.

The strict interpretation of s 44(i) in combination with the institutional failings around s 44(i) and its relationship with representative government provide cause for concern in relation to the functionality of government, its institutions and public confidence. This has been manifested in the volatility associated with the number of referrals to the Court, 303 subsequent by-elections, a slender Government majority, 304 and the possibility, though receding, of further referrals. 305 These combined factors make desirable a more nuanced, comprehensive executive and parliamentary response, than an instinctive full adoption of the Joint Standing Committee referendum recommendations conferring legislative power to set disqualification rules.

³⁰³ A related issue is the workload of the High Court as the Court of Disputed Returns

³⁰⁴ In the 45th Commonwealth Parliament prior to the May 2019 election.

Not limited to s 44(i) – see 'Solicitor General to check if Peter Dutton is in breach of constitution' ABC News (online) 23 August 2018); Commonwealth Solicitor General Opinion 'In the matter of the eligibility of Mr Dutton pursuant to section 44 (v) of the Constitution' (Solicitor General Opinion No 21 of 2018, 24 August 2018); 'Coalition threatens to retaliate against Kerryn Phelps over Dutton referral' The Guardian (Sydney) 28 November 2018; 'Dutton referral would spark others: Pyne' The Australian (Sydney) 28 November 2018; 'Banks' defection sets up fresh bid to refer Dutton', Sydney Morning Herald (Sydney) 28 November 2018. Mr Dutton subsequently divested himself of financial interests in Government subsidised child care centres, in order to avoid possible future s 44 (v) issues.

Wisdom in a more balanced and differentiated response is complemented by the opportunities presented for the executive and the parliament to engage in restorative, rehabilitative and confidence building measures around representative government. Remedial measures for s 44(i) need to be modest, practical and based on enhanced citizen participation and political accountability, adapted to realise such objectives. This involves reconciling the Court's attenuated interpretive choices (as occasioned by s 44(i)) of representative government) and the reactions of the Executive and the Parliament, with broader electorate expectations of functionality and accountability in representative government. Reforms need to bridge the divide between the combined effects of the s 44(i) institutional responses — the Court, the Executive and the Parliament — and the contemporary expectations of the represented.

The ideal *eventual outcome* prompted from the Court's decisions would be a bipartisan set of modest reform proposals following joint consideration of the three long completed review committee reports, ³⁰⁶ combined with the more restrained 2018 review recommendations, submitted to a s 128 referendum. Working against this are future Government and Opposition political opportunities (in seeking or resisting further referrals to the Court) in deferring or declining substantive reform. The former Prime Minister was ambivalent about a constitutional referendum.³⁰⁷ The historically poor record of referendum success additionally works against that development.³⁰⁸ Conducting a successful referendum on s 44(i) and broader s 44 reform

³⁰⁶ See the discussion of the three review committee findings under the above heading 'The three Parliamentary Committee and Constitutional Commission reports: reviews of Section 44 (i)'.

Malcolm Turnbull, 'Radio Interview with Fran Kelly, ABC Radio National Breakfast' (Prime Minister Media Transcript, 7 November 2017) and Malcolm Turnbull, 'Press Conference: Citizenship and Section 44 – Parliament House' (Prime Minister Media Transcript, 7 November 2017).

³⁰⁸ Of 44 referenda proposed since Federation, only 8 have succeeded in obtaining the approval of a majority of voters in a majority of states: George Williams, Sean Brennan and Andrew Lynch *Blackshield and Williams Australian Constitutional Law and Theory Commentary and Materials* (Seventh edition, Federation Press 2018), 1409.

also presents as lower priority than the more pressing reform issues requiring a referendum — indigenous constitutional recognition and a republic. Prioritisation of s 44 reform over these recognisable topics of public debate might appear as further political indulgence. ³⁰⁹ The majority Joint Standing Committee report approach of a referendum first to de-constitutionalise the s 44(i) protection, arming the Parliament with legislative power to set disqualification standards, ³¹⁰ but *only then* involving the electorate in consultation and debate, communicates an adverse message.

A more modest and achievable referendum reform would be moving the disqualification point from nomination to swearing in to Parliament, with a further three months tolerance period from the commencement of the new parliament³¹¹ or existing parliament, in the case of a by-election. A seat would be declared vacant (and an ensuing by-election or re-count) upon the expiration of that period. This would combine proportionate flexibility with strong incentives for political parties to thoroughly vet candidates' foreign citizenship entitlements. It would address a significant proportion of disqualification issues.³¹²

Jindigenous Constitutional Recognition: Australia, Referendum Council Final Report of the Referendum Council (Department of Prime Minister and Cabinet 30 June 2017); Australia, Expert Panel on Constitutional Recognition of Indigenous Australians Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution Report of the Expert Panel (Department of Families, Housing, Community Services and Indigenous Affairs, January 2012); Australia, Aboriginal and Torres Strait Islander Act of Recognition Review Panel, Hon John Anderson AO, Ms Tanya Hosch and Mr Richard Eccles Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel (Department of Prime Minister and Cabinet, September 2014); Australia, Commonwealth Parliament, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Final Report (June 2015); The Australian Republic: Australia, Republic Advisory Committee (AGPS 1993).

³¹⁰ See the discussion under the heading 'Responding to the s 44(i) cases by contemporary review: The 2018 Joint Standing Committee on Electoral Affairs review'.

³¹¹ See the similar arrangements in s 64 of the Commonwealth Constitution allowing Ministers to hold office for a maximum of three months before becoming a senator or a member of the House of Representatives.

³¹² Particularly elections called at short notice, the lead time needed to renounce foreign citizenship, and the indirect discriminatory resource and financing

In restoring confidence in and rehabilitating the operation of s 44(i) in constructing the practicalities of representative government, other measures collaboratively legislated and procedurally implemented at a party level will usefully garner support for modest, eventual s 44(i) referendum reform. A rigorous and exhaustive vetting process administered by individual political parties, carefully calibrated to the nuanced standards of *Re Gallagher* for renunciation is essential. Political parties are likely to adopt intensified pre-nomination citizenship vetting of their candidates, as well as clearer, overt and *more particularised* (to individual circumstances of foreign nationality) procedures to ensure that candidates meet the criterion of taking all reasonable steps available to divest themselves of citizenship status under foreign law.³¹³

The register of foreign citizenship interests introduced by the former Prime Minister and the Attorney General was an interim expedient. It was criticised for failing to ensure politicians provide enough documentation to substantiate, rather than complicate, their claims of s 44(i) compliance.³¹⁴ The low documentation requirements seemed corroborative of an existing culture whereby s 44(i) compliance was treated in a perfunctory manner. The register's omissions regarding both content requirements and its provision should be enhanced on a bipartisan basis, marking a new pro-active and prudential s 44(i) approach for compliance. Verification will increasingly likely be generated by improved political party vetting

burden upon minor parties and independents in satisfying renunciation requirements.

³¹³ (2017) 263 CLR 284, 313; (2018) 263 CLR 460, 472-475.

An obvious omission at that point was a requirement to substantiate and document the nationality of grandparents and great grandparents (for reasons of foreign citizenship by descent). Numerous omissions of documentation proving eligibility for Parliament also featured in the information submitted by the 5 December 2017 deadline for the Parliamentary register: See 'Citizenship saga: Every foreign link to your MPs and whether they've shown proof' ABC News (online) 6 December 2017).

processes,³¹⁵ in turn underpinning improvements to the register of foreign citizenship interests.

This shortcoming is partly addressed by amendments to the Commonwealth Electoral Act requiring all candidates to complete a qualification checklist, 316 linked to parliamentary motion procedures for both houses.³¹⁷ However, this reform is compromised in that a relevant committee recommendation for s 376 referral is constrained. as the committee must find that the foreign citizenship issue arises from facts not already disclosed. 318 This procedure is largely reliant upon the good faith, discretion and integrity of those committees³¹⁹ in reaching determinations regarding characterisation of facts disclosed and the status of foreign citizenship law, and in its assessment of evidence taken from relevant foreign law experts. The matter therefore comes full circle, engaging public confidence in representative government and the representatives themselves. That confidence will be diminished if the procedure is used as a bipartisan device to preserve parliamentary representation. Integrity of representative government will be further eroded – in sustaining of prima facie

³¹⁵ These party reforms would also convey a stronger civic culture of commitment to representative government values.

³¹⁶ Electoral Legislation Amendment (Modernisation and Other Measures) Act 2018 (Cth) – which makes completion of a Qualification Checklist compulsory, placing the onus on nominees for election to be satisfied as to their eligibility to sit in Parliament. See sections 170, 170A, 170 B, 181 A, 181 B and 181 C and Schedule 1 Form DB Qualifications Checklist of the Commonwealth Electoral Act 1918 (Cth).

³¹⁷ For referrals by motion under s 376 of the Commonwealth Electoral Act 1918 (Cth). See the discussion under the heading 'The interpretive choice of a high irremediable threshold – difficulties with predictability and certainty', above.

³¹⁸ In accordance with the Part XIV Commonwealth Electoral Act 1918 (Cth) nomination procedures, including the qualifications checklist.

³¹⁹ The Standing Committee of Senators' Interests (Senate) and the Committee of Privileges and Members' Interests (House of Representatives). Obvious difficulties arise in this process if there is a disclosure in accordance with Part XIV of the Commonwealth Electoral Act 1918 (Cth), or on the respective Registers of Members' Interests, where there is (i) no corroborative documentation provided or (ii) a disclosure is made that on all the evidence points to likely disqualification. These circumstances would not appear to meet the Parliamentary motion requirements for a s 376 Commonwealth Electoral Act referral.

disqualified persons in Parliament³²⁰ and from the publicity of detail generated by investigative Committee processes around ambivalent cases, when public awareness emerges after 40 day petition limits under s 355 *Commonwealth Electoral Act 1918* (Cth) expire.³²¹

The ability of minor parties and independents to engage, given available resources and legal expertise, in the same level of prenomination vetting is problematic. The imposition of the explicitly high standards for renunciation raises the issue of candidate deterrence, especially as renounced citizenship may be impossible to reinstate upon election failure. Rigorous pre-nomination vetting would appear prudent, and incumbent, for *all* candidates with a plausible prospect of election to a House of Representatives or Senate seat. A scheme of financial assistance (or ex post facto taxation rebate) might be introduced for those candidates meeting a particular advanced deadline prior to an election, who are not presently represented in the Parliament, as a minor party or independent.

A variety of other reformative measures not involving constitutional amendment have been advanced,³²² each worthy of consideration. The Court's interpretive choices and the high thresholds around s 44(i) provide pause for deliberation and reflection. Opportunities are afforded for politicians to transcend intense political contestation and to redeem representative government credibility and standards from a sceptical electorate, through a balanced address of s 44(i) issues.

320 See Twomey (n 213) 20.

³²¹ See s 355 (e) of the *Commonwealth Electoral Act 1918* (Cth) requiring filing of petition within 40 days of return of election writs.

³²² See Excluded The impact of section 44 on Australian democracy (n 39) especially the Administrative reforms and the Legislative and procedural reforms referenced in 'The majority Joint Standing Committee report: a critical appraisal' (n 40).